Supreme Court, U.S.
FILED

961386 FEB 11 1997

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

October Term, 1996

In the Matter of the
Estate of Doris Lichtman,
deceased

Joan Lichtman, CPA
Petitioner

v.

Cecil Lichtman
Jules Lichtman
Executors
Respondent

Petition for a Writ of Certiorari

to the
Supreme Court of New Jersey

Joan Lichtman, CPA
Pro Se
Box 1136
Philadelphia, PA 19105
215.568.5908

Dated: February 10, 1997

114 pp

QUESTIONS ASKED

1. When the Internal Revenue Service knows that taxpayers owe federal tax, can the Service refuse to collect the tax?

2. In practice, where is the bright line between ministerial and discretionary duties in the Internal Revenue Service?

3. What are the standards of judicial enforcement/intervention into federal agencies' decisions regarding the interpretation and application of law to facts; and, are those standards universal or agency specific?

4. In practice, what are attorneys' and accountants' liabilities and responsibilities for ensuring that their clients have complied with the Internal Revenue Code and have paid taxes owed in full, timely?

5. What are the obligations of state courts to ensure that litigants' federal income taxes are paid and/or to stop/prevent tax evasion?

6. When a court knows that litigants have committed tax evasion, what are the court's duties as to criminal law-enforcement?

TABLE OF CONTENTS

Questions Asked *i.*

Table of Citations *iv.*
- Cases *iv.*
- Statutes *vii.*
- Other Authorities *viii.*

Jurisdictional History 1

Statement of Jurisdiction 1

Statutes Involved 2

Statement of the Case 3
- Point I. 3
- Point II. 12
- Point III. 28

Reasons for Granting Writ 31

i. Issues of public importance not yet decided by the Supreme Court

ii. State court of last resort decided a federal question in conflict with statutes and decisions of the Supreme Court

Conclusion 31

APPENDICES

A. Denial of Motion for Reconsideration New Jersey Supreme Court — App.1

B. Denial of Petition for Certification New Jersey Supreme Court — App. 2

C. Denial of Motion for Reconsideration New Jersey Appellate Division — App. 3

D. Appellate Division Judgment — App. 4

E. Decision of the Superior Court — App. 6

F. Statutes Reprinted — App. 11

G. Tax Court, Docket No. 25983-91 Transcript — App. 39

H. Court of Appeals, Third Circuit Docket No. 95-1570 Brief — App. 47

TABLE OF CITATIONS

CASES	Page(s)
AARP v. EEOC (1987) 655 F.Supp 228	20-24
Andujar v. Weinberger (1976) 69 F.R.D. 690	21
Almonte v. Pierce (1987) 666 F.Supp. 517	21
Badaracco v. Commissioner (1984) 464 US 386	29,30
Brewer v. Hoxie School District (1956) 238 F2d 91	28
Brown v. United States (1989) 890 F.2d 1329	6,12,30
Cheek v. United States (1991) 111 S.Ct. 604	4,29
Detroit Bank v. United States (1943) 317 US 329, 63 S.Ct. 297 87 L.Ed. 304	11
Dollar Savings Bank v. US (1873) 22 L.Ed. 80	4
George Moore Ice Cream Co. v. Rose (1933) 289 U.S. 373	14
Heckler v. Chaney (1985) 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714	22
Intercity Transportation Co. v. US (1975) 737 F.2d 103, 108	22
Lawrence v. United States (1982) 631 F.Supp. 631	20

cases, continued

Lichtman, I/M/O
Estate of Abraham 10,16,18,19
NJ Supreme Court, 24,26,30
Docket No. 39,937
cert. den. (not reported)

Lichtman (Joan) v.
Commissioner (IRS) (1991) 17,19
Tax Court
Docket No. 25983-91
(not reported)

Lichtman (Joan) v. US (1995) 16,26
US Court of Appeals
Third Circuit
Docket No. 95-1570
(not reported)

McMahon v. Califano (1979) 21,25
476 F.Supp. 978

Nakajima All Co., Ltd. v.
U.S. (1988) 21
691 F.Supp. 358

Natural Resources Defense
Counsel v. SEC (1979) 22
606 F.2d 1031

Osborn v. Bank
of United States (1824) 28
9 Wheat. 738, 6 L.Ed. 204

Potomac Electric Power
Company v. ICC (1983) 24
702 F.2d 1026

Rosenberg, Matter of
Estate of Henry (1935) 11
269 NY 247, 199 NE 206,
105 ALR 1238
cert. den. (1936) 298 US 669,
80 L.Ed. 1392,
56 S.Ct. 834

Stang v. IRS (1986) 15,21,29
788 F2d 564

cases, continued

Tax Analysts and Advocates v. Schultz (1974) 376 F.Supp. 889 — 21

Telecommunications Research and Action Center v. FCC (1984) 750 F.2d 70 — 23

Testa v. Katt (1947) 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 — 28

US v. Ayer (1926) 12 F2d 194 — 4

US v. Denson (1979) 603 F.2d 1143 — 21

US v. Rodgers (1983) 461 US 677, 76 L.Ed.2d 236, 103 S.Ct. 2132, — 11,12,13,23

US v. Saleh (1980) 514 F.Supp. 8 — 11

STATUTES — Page(s)

U.S. Constitution, Art. VI, cl. 2 — 19,20,28-30

U.S. Constitution, Art. VI, cl. 3 — 7,11,19,20, 28-30

5 C.F.R. § 2635.101(b)(8) — 13,20

26 C.F.R. § 301.7214-1 — 13

20 Fed.Proc.L.Ed. 700 §48:1241 — 21

Internal Revenue Manual, MT 4392(1),(2),(4) — 4,17

N.J. Civ. Proc. Rule. 4:87-7 — 7

N.J.S. 54:37-8 — 5

N.J.S. 54:38-5 — 4

N.J.S. 54:38-11 — 4

N.J.S. 3B:10-23 — 5

N.J.S. 3B:10-28 — 5

N.J.S. 3B:17-8 — 5,7

Statutes, continued

5 U.S.C. § 701(a)	22
5 U.S.C. § 706	16,24
28 U.S.C. § 1361	16,24
26 U.S.C. § 663(c)	17
26 U.S.C. § 678(a)	17
26 U.S.C. § 2002	4
26 U.S.C. § 2031	4
26 U.S.C. § 2044(a)	3
26 U.S.C. § 2056(a)	3
26 U.S.C. § 2056(b)(1) and (b)(7)	3
26 U.S.C. § 2204(a)	9
26 U.S.C. § 2205	7,10
26 U.S.C. § 6075(a)	4
26 U.S.C. § 6161(b)(2),(3)	5
26 U.S.C. § 6201(a)	4,13,15, 20,27
26 U.S.C. § 6203	4
26 U.S.C. § 6211(a)	13,15,27
26 U.S.C. § 6213(b)(1) and (g)(2)(C)	4
26 U.S.C. § 6301	27
26 U.S.C. § 6324(a)(1),(2),(3)	4,9,11
26 U.S.C. § 6331(a)	10
26 U.S.C. § 6501(a),(c)(1-3)	15,24
26 U.S.C. § 6601(a)	4,10
26 U.S.C. § 6694(a),(b)	10,12
26 U.S.C. § 6701(a),(b),(d)	10
26 U.S.C. § 7201	4,17
26 U.S.C. § 7202	4
26 U.S.C. § 7206(1),(2)	4
26 U.S.C. § 7214(a)(3-6),(8)	10,13,20,27
26 U.S.C. § 7403(a)	13,23
26 U.S.C. § 7421(a)	15

OTHER AUTHORITIES — Page(s)

Butler, Paul J.
"Anti-Injunction Act Does
Not Bar Action Challenging
Revenue Ruling When
Nontaxpayer Seeks to
Impose Tax Liability"
24 Emory L. J. 1191 — 19

Clapp and Black
Wills and Administration
§ 1124 — 7

JURISDICTIONAL HISTORY

Executors of the estate filed a "First and Final Accounting" in New Jersey Superior Court on August 11, 1994. The lower court judge appointed a Guardian-ad-Litem on September 11, 1994. An adult contingent beneficiary filed exceptions and objections on or about October 2, 1994. The lower court hearing was October 14, 1994, wherein the judge approved the accounting as filed, which was followed by a written judgment signed on November 15, 1994, which included a hand-written addendum, denying the beneficiary's motion for reconsideration.

An appeal was filed on January 3, 1995. The Appellate Division affirmed the lower court's decision on December 7, 1995. The defendant-appellant's motion for reconsideration filed on December 18, 1995 was denied on February 13, 1995.

On February 26, 1996, the defendant-appellant filed a petition for certification with the New Jersey Supreme Court. The petition was denied, June 19, 1996 [145 NJ 373] and the motion for reconsideration was denied on November 13, 1996.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

United States Constitution, Article VI,
clauses 2 and 3.

The underlying problems stem from:

26 U.S.C. 2056(b)(1)(B)
and related sections of the Internal Revenue Code, including regulations;
N.J.S. 3B:10-23
Duty of personal representative to settle and distribute estate;
N.J.S. 3B:10-28
Expeditious settlement and distribution;
N.J.S. 3B:17-8
Effect of Judgment Allowing Account;
N.J.S. 54:38-2
Additional tax in certain cases;
N.J.S. 54:38-11
Funds out of which tax is payable;
N.J.S. 54:38-5
When tax due, interest on arrearages, time extensions;
et al.

All statutes are reprinted in Appendix.

STATEMENT of the CASE

Point I.

Executors' Negligence Caused Added Estate Tax.
The Executors Knowingly Refuse to Pay the Tax.
The Executors Committed a Felony.
The Executors' Attorneys/Accountants Did Not Act to Ensure Payment of the Additional Tax.
The Guardian-ad-Litem Denies the Tax Problem.
Executors' Attorneys/Accountants Have Independent Duties to Ensure the Tax is Paid.
The Executors Shifted Their Tax Burden Onto Innocent Beneficiaries Who are Minors.
The Estate Corpus Remains At Risk for the Tax.
If the Tax is Paid with Estate Assets, Minors' Property Will Be Lost Without Due Process.
The Minors are Bound *Without Recourse*.

Doris Lichtman's Will provided for her executors to make elections to minimize estate tax liability and for two testamentary trusts. Doris' husband, Cecil Lichtman, an executor, could receive the trusts' income for life. Upon Cecil's death, the trusts' income will be divided among Doris' children; and, on the children's deaths, the corpus goes to her grandchildren, all of whom were minors when Doris died. Paying tax is fiduciaries' priority. These executors made a QTIP (Qualifying Terminal Interest Property) election on the federal estate return to maximize the marital deduction and minimize the tax. [26 U.S.C.§§ 2056(a),(b)(1),(b)(7); 2044(a)].

26 U.S.C. § 2056(b)(1)(B) states that no marital deduction is permitted, after the failure of the interest passing to the surviving spouse. In the instant case, the executors did not fund

the trusts, thus losing the marital deduction. The executors' breach caused an increased tax for which they are personally liable [26 U.S.C. §§ 2002; 6324(a)(3); 7206(1),(2); N.J.S. 54:38-11].

Estate tax is due in full 9 months after DOD (date of death) [26 U.S.C. §6075(a)]. That added tax from the lost marital deduction became due in 1989 [26 U.S.C. § 2031(a)]. The amount of added tax is the marital deduction multiplied by the tax rate [26 U.S.C. §§ 6203; 6213(b)(1),(g)(C)]. Interest attaches to underpayments [26 U.S.C. § 6601(a)]. The executors must pay all estate taxes within 18 months [N.J.S. 54:38-5]; i.e., by June 26, 1990. The executors know the tax they paid/ reported in 1989 is incorrect and insufficient.

An estate is closed for tax purposes when the IRS issues a closing letter [Internal Revenue Manual MT 4392 (1),(2),(4)]. This estate's letter was issued in 1990. The executors ought have paid the additional tax, voluntarily.

Tax assessments are of two types: amounts reported by taxpayers; amounts added by the Secretary [26 U.S.C. § 6201(a)(1)]. Had the executors paid the tax, interest would stop accruing. Their not paying that additional tax due does not prevent the IRS' collection [*US v. Ayer*, 12 F2d 194; and, *Dollar Savings Bank v. U.S.* 22 L.Ed. 80]. The *Ayer* and *Dollar* courts ruled that mere existence of the tax gives the IRS authority to collect, without assessment.

Refusing to pay taxes known due is willful non-compliance, i.e., a felony. [*Cheek v. US*, 111 S.Ct. 604, 610-11; 26 U.S.C. §§ 7201; 7202; 7206(1),(2)]. The estate tax due date can be extended beyond 4 years only for 'reasonable

cause', but not for negligence. [26 U.S.C. § 6161(b)(2)]. At 8 years, the tax, resulting from the executors' negligence, remains unpaid.

The executors filed their "First and Final Accounting" in August 1994. Executors are under duty "by law [and] the terms of the will" i.) to settle the account and distribute the estate "expeditiously and efficiently ... consistent with the best interests of the estate" and "for the best interests of successors to the estate" [N.J.S. 3B:10-23] and ii.) to "proceed expeditiously with the settlement and distribution ... and do so without adjudication" [N.J.S. 3B:10-28]. The executors did not comply with the terms of the will; did not distribute nor close the estate, yet went to court 6 years after the date of death to file an accounting, not "to resolve questions concerning the estate or its administration" [N.J.S. 3B:10-28]. If taxes are not paid in full, executors cannot secure a judgment for their 'final' accounting [N.J.S. 54:37-8]. Furthermore, the effect of the judgment allowing these executors' account is to bind the successors, i.e., minors, *without later recourse* [N.J.S. 3B:17-8].

A Texas executor sought an unnecessary court ruling to prolong his tenure.

> "[T]he natural tendency of a busy probate court is to accede to a proposed order without great deliberation when all known interested parties are in agreement and when state interests are not adversely affected.
>
> "Federal courts have not looked favorably on taxpayer attempts to achieve post-death estate planning by employing nonadversary

probate court proceedings...". *Brown v. US*, 890 F.2d 1329, 1342-3 and note 15.

In the instant case not all parties agreed. The petitioner, a contingent beneficiary and CPA, put exceptions/objections in the lower court, dealing with, among others, malfeasance by the Guardian-ad-Litem, the unpaid estate tax, unauthorized corpus distributions, illegal distribution of estate income, and an executor's falsified check with his attorney's falsified affidavit. The court summarily approved the accounting as filed without any evidentiary hearing.

The Will provided for only trust income to be paid to one executor-beneficiary. Trusts, not funded, do not exist. The executors, who never became trustees, had no authority to distribute any estate income to anyone. The 1994 accounting as filed showed a 1989 invasion of corpus. As of the accounting's filing, Cecil Lichtman, the executor-income-beneficiary had not repaid his improper 1989 receipt of estate corpus. Had the executors intended to correct that illegal corpus invasion, Cecil Lichtman would have repaid the moneys long before filing the accounting. Also, the Will stated that trust income not distributed was to be retained as corpus. Thus, hundreds of thousands of estate income paid to Cecil should have been retained in the estate as corpus, along with all its compounded interest. The estate's corpus should be much larger than that shown in the accounting as filed[1].

[1]. That event also creates significant tax consequences which are not herein discussed, since the executors have not yet been surcharged

M. Carole Duffy, Esq., Guardian-ad-Litem, appointed to represent the corpus remaindermen, all minors, was contacted by the CPA to discuss all the problems with executors' accounting. Mrs. Duffy refused to speak with the accountant and then she denied the estate's problems. Despite her knowledge of the large unpaid estate tax, the Guardian claims the estate has no problems. At both the New Jersey Appellate and Supreme Court levels, she attached herself, by permission of the executors' attorney to his brief, which takes a position *directly opposite* to the minors' welfare: an egregious act. The estate corpus is at risk for collection by the Internal Revenue Service [26 U.S.C. § 2205]. The Guardian supports the executors' felony against the minors in her charge. Minors represented by a Guardian-ad-Litem are bound by court rulings without recourse. [N.J.S. 3B:17-8; Clapp and Black, Wills and Administration, § 1124] Mrs. Duffy, an attorney[2], defied her oath to defend the United States Constitution, Art. VI, cl. 3.

Moreover, the Guardian failed even to comply with basic state law. New Jersey Rule of Civil

with that breach nor have they voluntarily repaid all those moneys back into the estate.

[2]. The legal obligations of the executors' attorney and accountant are discussed *supra* as well as *infra* regarding analyses of the tax issues for multiple estates where these same executors are also trustees.

Procedure, R. 4:87-7, requires Guardians-ad-Litem to file a written report in the court seven days prior to a hearing for an accounting. Mrs. Duffy never filed a written report. She came to the October 14, 1994 hearing, claiming she did not have enough time to complete her review of the papers. She had more than one month. Mrs. Duffy said the exceptions timely filed (on behalf of the minors by their aunt) were too late for her to examine. Mrs. Duffy's examination should have been independent, relying on no one else's work. The Guardian's denying admonitions of a licensed CPA, knowledgeable in tax matters, was a clear breach of her duty to the minors. Moreover, the court's denial of the licensed CPA's expertise is unconscionable. That CPA requested that the court discipline and remove the Guardian from this case. The court administrators declined.

The executors' attorney, Peter Eld, argued the estate could not be closed because not all the administration expenses were known. These 'as yet unknown' expenses were annual estate taxes, which, had the estate been closed, would not have been incurred. As to estate income distributions to Cecil Lichtman, Mr. Eld claims that all the trusts' income would have been paid to Cecil. The Will did not provide for automatic annual distribution of all the income from both trusts[3].

[3]. Mr. Eld was incorrect in claiming that all the trusts' income would be distributed to Cecil Lichtman, automatically. The Will provided that, prior to any income distributions from one trust to Cecil Lichtman, the other executor was required to apply a 'comfort and welfare' standard. The

Both the executors' lawyer and the Guardian see no harm in the executors' failure to fund the trusts. Following the Guardian's lead, the judge approved the executors' accounting without an evidentiary hearing. The judge said,

> "I think it would have been better for the trust (sic) to have been funded earlier. ... [T]he executors have kept the trust (sic) assets in the probate estate. There is, in fact, no damage..." [Tr. 10/14/94, p. 18-19].

The Appellate Division[4]'s opinion reads,

> "[O]ur intervention is unwarranted. Judge Stanton undertook a detailed review of each of Ms. Lichtman's exceptions and found them to be without merit. We affirm...his thoughtful and thorough oral opinion of October 14, 1994." [Emphasis added].

The Appellate Court never heard the oral opinion.

26 U.S.C. §§ 2204(a) holds executors liable, personally, for unpaid estate tax. The estate has an automatic lien until Christmas, 1998 [26 U.S.C. § 6324(a)]. The executors refusal to pay the tax shifts the tax burden onto the estate's assets, which the IRS can seize. [26 U.S.C. §§

other executor is Cecil's brother. Jules never applied any standards prior to any distribution. Jules automatically paid all the estate income to Cecil, in direct violation of the governing Will.

[4]. The IRS, federal and state courts' responsibilities and rulings, respectively, with respect to the executors' actions in the instant case are discussed *infra*.

2205, 6331(a),(b)]. The marital deduction was about $900,000; the tax rate is about 50%, making the tax about $450,000. All the delays render the estate's assets insufficient to pay the tax. [26 U.S.C.§6601(a)]. The executors' accountants and attorneys, and the Guardian-ad-Litem have all known for years of the executors' frauds and the unpaid estate tax. Peter Eld, a 30-year career estate/trust attorney with a masters in taxation, prepared the estate's tax return. Peat Marwick, the accountants, knew of the 1½ year limit to pay estate tax; they prepared the annual estate returns. Had the trusts been funded, as required, those returns would have been, not estate, but trust returns. Peat Marwick also knows of the QTIP failure. Accountants[5] who knowingly prepare false returns face sanctions.

Despite their knowledge of the executors' felony; all those professionals remain silent, facing potential criminal charges [26 U.S.C. §§ 6701(a),(b),(d) and 6694(a),(b)]. Even Internal Revenue Agents[6] could face criminal charges (fines and imprisonment) for ignoring fraud and failing to collect tax [26 U.S.C. §7214(a)]. In a

[5]. Any duty of the executors' accountant to report independently the unpaid estate tax of its client to the Internal Revenue Service is not a matter directly related to the content of the instant case and, therefore, is not specifically addressed herein.

[6]. As to the Internal Revenue Service's obligations to collect this tax see *infra* as well as 26 U.S.C. § 7214(a).

closely related estate/trust case [*I/M/O Estate of Abraham Lichtman*: Superior Court Docket No. 9738-W; New Jersey Supreme Court Docket No. 39,937, cert. den.], Cecil Lichtman said he relies on his accountants' advice. Had Peat Marwick prepared an amended estate return, the executors would likely have paid the tax.

An estate tax lien for 10 years from DOD attaches automatically [*United States v. Saleh*, 514 F.Supp. 8, *Detroit Bank v. United States*, 317 US 329, 63 S.Ct. 297]; is on the gross estate [26 U.S.C. § 6324(a)(1)]; is binding on innocent bystanders and beneficiaries [26 U.S.C. § 6324(a)(2). *In re Estate of Henry Rosenberg*, 105 ALR 1236, cert.den. 298 US 669].

> "[N]o policy of this state may interfere with the power of Congress to levy and collect taxes on income." *Estate of Rosenberg, supra.*, at 1240.

Given the executors' fraud, the expiration of the 10-year estate lien does not prevent the IRS' future collection of the tax. No statute of limitations exists for civil tax fraud. The estate's assets are at risk almost *ad infinitum*. The executors shifted the tax burden for their negligence onto the minors [*US v. Rodgers* (1983) 461 US 677]. Congressional intent was not that minors' property be wantonly sacrificed due to negligence by fiduciaries charged with keeping that very property safe.

The executors' committed fraud and a felony by refusing to pay the estate tax. The executors' attorney and the Guardian-ad-Litem took oaths to protect and defend the U.S. Constitution; yet, they refuse so to do. [Article VI, cl. 3]. The

accountants prepared tax returns which they know do not comply with the federal tax code; thus making those accountants in willful violation of federal law [26 U.S.C. § 6694, and *supra*]. The Guardian-ad-Litem permits estate assets to remain at risk, ignoring her duty to protect the minors. Mrs. Duffy replaced due diligence and due process with silence, making the executors' fraud *res judicata*. New Jersey Courts sustained the tax evasion, thus transforming the executors' felony into lawful conduct.

> "When a federal tax law establishes a uniform criterion ... the decision of a state probate court as to an underlying issue *a fortiori* should not be controlling. ... The Supreme Court holds that a federal court must make its own inquiry into relevant issues previously decided by a lower state court. *Brown v. US, supra* at 1342.

POINT II.

The Internal Revenue Service's duty to collect tax is ministerial and non-discretionary.

The Secretary is "required" and "shall assess all taxes" [26 U.S.C. §§ 6201(a)]. "All taxes" also means all taxpayers: not just some taxes nor selected taxpayers. The statute does not convey permission; it compels compliance.

> "The word 'may', when used in a statute, usually implies some degree of discretion. ... [and] can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statutes." *US v. Rodgers* 461 US

677, 706] and, "[T]he limited discretion accorded by §7403 should be exercised ... [in] keeping [with] the Government's paramount interest in prompt and certain collection of delinquent taxes." [Emphasis added.] *US v. Rodgers, supra.*, at 711.

Nothing is ambiguous. 'May' is not in 26 U.S.C. § 6201(a) and 26 U.S.C. § 7403 gives formidable means of tax collection: e.g., suit, and seizure of delinquents' property. Congress' intent is forceful, uniform and universal application of the tax code. Collection must be certain.

The tax code rests on tacit assumptions: i.) that Internal Revenue Agents are *always* prompt, assertive, and forthright, and ii.) the IRS' sole objective is timely collection of all taxes due. No tax code statute permits the Service to select which taxpayers will comply: The IRS must collect 'all' deficiencies; not just some [26 U.S.C. §§ 6201(a), 6211(a)].

"Employees shall act impartially and not give preferential treatment to any private organization or individual." 5 CFR § 2635.101(b)(8); and, from 26 CFR § 301.7214-1, "Any officer or employee of the United States acting in connection with any revenue law of the United States required to make a written report under the provisions of section 7214(a)(8) shall submit such report to the Commissioner, or to a regional commissioner or district director."

26 U.S.C.§7214(a) defines agents' unlawful acts: "Any officer or employee of the United States

acting in connection with any revenue law of the United States

(3) who with intent to defeat the application of any provision of this title fails to perform any of the duties of his office or employment; or

(4) who conspires or colludes with any other person to defraud the United States; or,

(5) who knowingly makes opportunity for any person to defraud the United States; or,

(6) who does or omits to do any act with intent to enable any other person to defraud the United States; or,

(8) who, having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law, fails to report, in writing, such knowledge or information to the Secretary; or ...

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. ... "The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured to be collected by execution."

In no statute nor regulations is a hint that any Revenue Agent has authority, or discretion to avoid collection of taxes, <u>all</u> taxes. Reasonable people assume that Revenue Agents exercise due diligence and vigilance with vigor and rigor. Internal Revenue Agents' duty to collect taxes is

uniform, universal and ministerial. [*George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 381]. Revenue agents' distinguishing taxpayers, so that only some taxpayers' delinquent tax is pursued, is an abuse of the IRS' ministerial duty of tax collection. IRS 'discretion' is limited to 'when', 'where' and/or 'by what means' tax will be collected; the IRS cannot choose who will pay and who will be exempt. The arsenal of statutory power tools provided by Congress for collection does not include 'no collection'.

Not even the Anti-Injunction Act [26 U.S.C. 7421(a)] prohibits a suit to "assess" tax. "Enforcing"/"imposing" tax is not "restraining" collection. In *Stang v. IRS*, 788 F2d 564, Stang had not filed his return nor paid his tax; he asked for a writ of mandamus, seeking to force an IRS suit against him.

> "...The IRS has no 'nondiscretionary duty' to assess Stang's taxes on demand. ... 26 U.S.C. §6501(c)(3) provides that the IRS may assess the tax liability of individuals who fail to file a return 'at any time.' [Emphasis added.] *Id.* at 565.

'At *any* time' does not mean '*never*'. If the IRS knows about additional tax due, by statute, the IRS must collect it. Tax assessment/collection is ministerial [26 U.S.C. § 6201(a); 6211(a)]; IRS discretion is limited only to the means and timing by which collection is achieved. Congress intended that the tax code be administered even-handedly, uniformly and universally. IRS refusal to collect tax known to be due defies statute and countermands Congressional intent.

Courts have declined to substitute their judgment for federal agents' specialized knowledge. Judges claim they have no authority to order the IRS to collect tax due [*Joan Lichtman v. US*, not reported, U.S. Court of Appeals, Third Circuit, Docket No. 95-1570]. Capricious/abusive decisions may be reviewed by courts. Courts can compel agencies to perform when their act has been unlawfully/unreasonably delayed. [5 U.S.C. § 706 and 28 U.S. §1361]

The instant case and a familial case with almost identical actors [*I/M/O Estate of Abraham Lichtman* ("*I/M/O EAL*") NJ Supreme Court, Docket No. 39,937] have similar fact patterns. Both show adverse outcomes of unfettered IRS behavior.

I/M/O Estate of Abraham Lichtman, also a New Jersey case, involves the same executors (but as trustees), the same attorney and identical accounting firm. The tax returns at issue are many of the seven testamentary trusts' income returns and a host of individual tax returns, including the trustees' personal returns. The trustees brought the case against one corpus beneficiary: that beneficiary is the same licensed CPA; aunt to the minors in the instant case, *I/M/O Estate of Doris Lichtman*, ("*I/M/O DSL*"); and the petitioner. *I/M/O EAL* went to trial. Evidence in the court records shows the trustees did not file the seven trusts' tax returns and their personal returns in compliance with federal tax law. The trustees testimony shows they knew their returns were improper.

The IRS was told about the impropriety of all those returns by a licensed CPA; but, rather than collect the tax from the trustees, the IRS

erroneously assessed the CPA. That case went to trial in federal Tax Court on March 23, 1992 as *Joan Lichtman v. Commissioner of IRS*, Docket No. 25983-91, after the IRS withdrew its knowingly wrong assessment for which the IRS refused to issue a closing agreement. The consequence of that IRS' assessment withdrawal and the Tax Court judge's decision, proves that the IRS knows that the trustees diverted their multi-million dollar *personal* income tax onto those seven innocent corpus beneficiaries u/w/o Abraham Lichtman, when the trustees improperly filed trust K-1s showing that the corpus beneficiaries received taxable income, when, in fact, the taxable income was paid to the trustees.

The corpus beneficiaries received corpus, per the trustees' testimony; and, those distributions are non-taxable [26 U.S.C. §§678(a), 663(c) and the Tax Court case]. The trustees, who know the millions in income they took from those trusts is fully taxable to them as individuals (mostly at 70%), never filed amended trust nor amended personal returns, nor have they paid those millions of dollars in back taxes, which they know they owe: a felony [26 U.S.C. §7201]. Despite knowledge of his clients' tax evasion, Peter Eld[7], Esq. still represents to courts that

[7]. While the consequences to Mr. Eld from his liabilities and responsibilities for his false representation in court as to his client's behavior and his subornation of perjury is not a subject of this petition, that Mr. Eld, an attorney, does not honor his oath under the U.S. Constitution, Article VI, cl. 3, is a substantive matter herein.

the trustees committed no crime, either by the willful false filing of their tax returns or through perjured testimony.

KPMG Peat Marwick prepared all those trusts' tax returns as well as all the individual returns of Cecil Lichtman (who so testified). KPMG Peat Marwick knows about the trustees' tax evasion on trust and individual returns: from Peat Marwick's general knowledge of tax law; from independent reports to Peat Marwick's partner-in-charge of those accounts by that licensed CPA and trust beneficiary; and, most importantly, from the New Jersey State Board of Accountancy's 1989 hearing against that partner conducted by a New Jersey deputy attorney general and state prosecutor, thereby making a legal record as to the attorneys and KPMG Peat Marwick's roles in all the schemes of income tax evasion as well as Peat Marwick's improper preparation of the tax returns.[8]

During the years of trial/hearings for *I/M/O EAL*, the sitting judge was notified of the trustees' tax evasion. The judge ignored all the hard evidence and testimony of their tax frauds, as well as the transcript and judicial ruling for

[8]. The New Jersey Board of Accountancy is not a judicial body. The Board cannot take legal action against the accountant for his role in the preparation/presentation of fraudulent returns, unless and until a court decision, ruling those returns to be fraudulent, exists. New Jersey courts have thus far declined to address the issue of all those fraudulent returns during the original case. No court ruling regarding those trusts' tax returns has yet been made.

the federal case, *Joan Lichtman v. IRS*, Docket No. 25983-91 [Appendix G], which proved the trustees' tax evasion.

In her petition for certification before The New Jersey Supreme Court, that CPA-petitioner provided evidence to that court showing the tax fraud. The trustees' attorney took an oath [U.S. Constitution, Art. VI, cl.3] to uphold federal law. When his clients' tax fraud became a matter of public record (rendering any attorney-client privilege moot), the attorney had an affirmative, obligatory duty to ensure that federal law was upheld, even when adverse to his clients.

After the New Jersey Supreme Court denied the CPA's petition for certification, the defendant wrote a letter dated July 10, 1995 to the Supreme Court about the consequences of the denial for certification. Among the consequences specified was the extensive tax fraud. The New Jersey Supreme Court acknowledged receipt of that notice by a letter from Stephen Townsend, Esq., Clerk of the Supreme Court Clerk. The New Jersey Supreme Court has an option to re-open a case on its own motion. To date, that Court has declined to reconsider the case and its crimes. Seemingly, to be in keeping with Article VI, cls. 2 and 3, the New Jersey Supreme Court ought re-open the case, if only to address the federal tax fraud.

The CPA-beneficiary, wrongly assessed by the IRS, subsequently filed a claim for refund of tax associated with a prior corpus distribution from *I/M/O EAL*, which, by virtue of that Tax Court case, was also wholly non-taxable to her. The District Court dismissed the case, claiming lack of jurisdiction.

The United States Court of Appeals for the Third Circuit summarily upheld that lower court's decision; however, the Appeals Court stated during oral argument before the bench that judges do not have the authority to force the IRS to collect the moneys from the trustees' tax evasion. [Tape recording of court hearing]. That court acknowledged the trustees' refusal to pay federal taxes, but took no action to enforce federal tax law either by ordering the IRS to collect or by ordering the trustees to pay in full. The Court of Appeals knows the trustees committed fraud, yet did nothing to stop, prevent or report the crimes, thereby allowing the fraud to remain unabated - a seeming violation of the U. S. Constitution, Article VI, cls. 2 and 3. Courts must take notice of federal law.

The IRS knows about the multi-millions in tax deficiencies, yet does nothing. The IRS violates statutes by refusing to collect tax [26 U.S.C. 6201(a)]: thereby, permitting known tax cheaters to continue their fraud; and carefully selecting taxpayers whom the IRS permits to escape taxation [5 CFR §2635.101(b)(8); 26 U.S.C. 7214(a)].

> Mandamus can issue for several reasons. When "action has been taken by government officials contrary to law and so plainly prohibited as to be free from doubt, it may be remedied by the issuance of a writ of mandamus. [citations omitted]. In such circumstances, mandamus will lie even though the duty breached is not purely ministerial." *Lawrence v. US*, 631 F.Supp. 631, 639.
>
> "Where, as here, a plaintiff charges a federal agency with a constitutional or

> statutory violation, mandamus is an appropriate relief." *Almonte v. Pierce*, 666 F.Supp. 517, 525.

Although mandamus is not granted for taxpayers to interfere with the assessment/collection of their own taxes [*Stang, supra*], mandamus has been granted for third-parties seeking enforcement of tax collection. [*Tax Analysts and Advocates v. Schultz*, 376 F.Supp. 889; Paul J. Butler, "Anti-Injunction Act Does Not Bar Action Challenging Revenue Ruling When Nontaxpayer Seeks to Impose Tax Liability", *24 Emory L. J.* 1191 at 1192, 1193, 1200, 1203 and 1204; 20 *Fed. Proc. L. Ed.* 700 § 48:1241].

Mandamus has issued to compel compliance with a variety of legal duties by a host of officials and bodies [*US v. Denson* 603 F.2d 1143, 1146]; and to force an agency director to comply with his own agency's regulations [*McMahon v. Califano* 476 F.Supp. 978, 982, *Andujar v. Weinberger*, 69 F.R.D. 690, 693-694]. Mandamus lies when agency acts are plainly contrary to law [*Lawrence v. United States, supra* at 639; *U.S. v. Denson, supra* at 1146]. Mandamus was issued to force government agencies to do purely discretionary duties [*AARP v. EEOC* 655 F.Supp. 228; *Nakajima All Co., Ltd. v. U.S.*, 691 F.Supp. 358].

AARP v. EEOC, 655 F.Supp 228 (subsequently reversed due to changed circumstances) is instructive as to the tests used by the court due to the EEOC's *unreasonable delays*.

> "Under the Administrative Procedure Act it is presumed that there is a right to judicial review of administrative action. [citations omitted]. However, the Act contains two

familiar exceptions to the general availability of that right. The second exception, that relied upon here by the EEOC, precludes judicial review when 'agency action is committed to agency discretion by law.' 5 U.S.C. § 701(a)(2). The Supreme Court has made it clear that the 'committed to agency discretion' exception forecloses judicial review only in the unusual case in which there is 'no law to apply'. [*Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714].

"The 'law that plaintiffs request the court to apply is that pertaining to undue and improper delay by administrative agencies in deciding matters assigned to them. ...

"The criteria for determining whether the presumption of review is overcome in the context of delayed agency action were restated in *Intercity Transportation Co. v. United States*, 737 F.2d 103, 108 (D.C.Cir.1975). In that case the Court of Appeals said that actions 'committed to agency discretion' are beyond the reach of judicial scrutiny when three factors are met: (1) there is little need to safeguard petitioner's interests; (2) review would impair the effectiveness of agency administration; and (3) the disputed issue is inappropriately drawn for judicial review. *Id. at 107*, citing *Natural Resources Defense Counsel v. SEC*, 606 F.2d 1031 (D.C.Cir 1979)." *AARP v. EEOC*, 655 F.Supp 228, 235.

In the instant case, (1) the minors' interests need to be safeguarded; (2) IRS' assessment and

collection of this tax is ministerial and will enhance agency effectiveness by making the IRS' do that which justifies its very existence; and (3) given the recalcitrance of both the executors and the IRS, no other remedy to force compliance with the law exists.

> "Finally, we are convinced that recognizing that district courts may exercise a degree of discretion in § 7403 proceedings is consistent with the policies of the statute".
>
> *US v. Rodgers*, 461 US 677, 703.

From *AARP v. EEOC, supra*, regarding the EEOC's unreasonable delay in doing a discretionary duty,

> "In *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C.Cir. 1984) (TRAC), the Court of Appeals articulated six factors that courts should consider in deciding whether an agency has unreasonably delayed actions, as follows:
>
> (1) the time agencies take to make decisions must be governed by a 'rule of reason'; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may support content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interest prejudiced by the delay; and (6) the court

need not 'find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed'. *AARP v. EEOC, supra* at 237.

"The Court of Appeals has aptly remarked that 'excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decision-making into future plans.'" *Potomac Electric Power Company v. ICC* 702 F.2d 1026, 1034 ....

"The Administrative Procedure Act grants to the courts broad authority to 'compel agency action unlawfully withheld or unreasonably delayed; ...' 5 U.S.C. 706(1). One way to compel such action is to issue a writ of mandamus pursuant to 28 U.S.C. § 1361--the remedy sought by plaintiffs in the instant case. Although mandamus was an extraordinary remedy at common law, it is an appropriate one under the APA if a federal agency has failed to discharge a duty that Congress has intended it to perform, or has unreasonably delayed to take lawful action." [Emphasis added.] *AARP v. EEOC, supra*. at 240-241.

Applying Rule of Reason analysis to the IRS' refusals re: *I/M/O DSL and I/M/O EAL*, yields:

(2) The IRS can collect the overdue taxes immediately without assessment (although the usual period for a tax assessment is three years) because no time limitation exists for tax fraud [26 U.S.C. §§ 6501(a) and (c)(3)];

(3) The executors/trustees shifted their large tax liabilities onto beneficiaries, adversely

affecting those innocents' health and welfare, making them effectively choose between life expenditures and paying the negligent fiduciaries' tax, leaving the beneficiaries in constant uncertainty as to when the tax will be collected, and allowing negligent executors to keeping their assets away from the IRS;

(4) Collecting taxes is the IRS' sole reason for being; no 'higher' priority exists, and, as to competing priorities, IRS collection of these multi-millions in back taxes ranks ahead of many
other cases already in progress or long ago completed;

(5) Delays in tax collection are inherently harmful, because the U.S. Treasury cannot afford revenue losses, and the economic and physical harm to the victims escalates;

(6) The IRS has known about these overdue taxes for many years; IRS' refusals to collect the tax violate Congressional intent and statute.

That quick analysis indicates the IRS delayed in performing its statutory and ministerial duty of tax collection. To issue mandamus,

> "[c]ourts generally require the presence of three factors before the writ will issue: '(1) a clear right in the plaintiff to the relief sought; (2) a plainly defined and preremptory duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available.'" *McMahon v. Califano, supra* at 981.

In the instant cases, beneficiaries ought not pay negligent/felonious fiduciaries' taxes; IRS duty to collect tax is statutory and ministerial; and,

since the executors clearly will not voluntarily pay their back taxes, no other remedy exists.

The more efficient, less expensive means of enforcing federal law in the instant cases would be for courts simply to issue orders forcing the executors to pay in full. Forcing innocent persons to spend years in court, correcting all these unconscionable wrongs, is an exhorbitant waste of judicial resources which serves only to delay and further complicate eventual collection, while also making innocent persons bear the burdens -- at great expense and extreme personal sacrifice -- of pursuing legal remedies against recalcitrant fiduciaries and the IRS, to force their compliance with law. Innocent people ought not have to do the IRS' job in its stead.

When the IRS knows of delinquent taxes, the IRS has a statutory duty to collect. The IRS usually acquires 'new information' about unpaid taxes due by voluntary assessments on tax returns, IRS investigations, or from informers.

For both *I/M/O DSL* and *I/M/O EAL*, the IRS was notified by the CPA who had first-hand knowledge and copies of fraudulent returns. In *I/M/O EAL*, the IRS wrongly assessed the CPA, proving to itself, that the trustees owed millions in back taxes. [Factual analysis appears in the brief to the United States Court of Appeals for the Third Circuit *Joan Lichtman v. US*, Docket No. 95-1570, Appendix H]. In short, the trustees filed trust tax returns, wrongly claiming that corpus beneficiaries received taxable income, which, in fact, was paid to the trustees. The trustees did not show their receipt of all that money on trust

tax returns, thereby letting themselves escape taxation on multi-millions of personal income.

In *I/M/O DSL*, the IRS independently learned of the delinquent tax, because the executors filed annual estate returns (1990-1995) at the same service center where their original estate return was filed. Those annual returns showed that the estate was still open beyond a reasonable time [18 months]. That 'new information' filed at the IRS Service Center obligates the IRS to collect the tax, since the executors refused to pay. In the instant case, those annual returns gave the same 'new information' to the IRS as would an amended return, had the executors so filed. So, those annual returns have the same effect as an amended estate return. [IRM MT 4392 (1), (2) and 26 U.S.C. §§ 6201(a), 6211(a)]. Since the executors effectively reported their delinquent tax as due, the IRS must collect, or agents risk prosecution under 26 U.S.C. §7214(a). Moreover, 26 U.S.C. § 6301 states,

> **"The Secretary shall collect the taxes imposed by the internal revenue laws."**

The IRS' denial of its duty to collect is clearly prohibited by statute. Not even the IRS' Commissioner can order that tax not be collected.

These two familial estate cases show how taxpayers refuse to pay millions of dollars in delinquent and fraudulent tax and the IRS refuses to collect. Both state and federal judges have declined to intervene. The crimes go unpunished.

That impasse is impenetrable.

POINT III.

New Jersey Judges Are Obligated to Ensure Both Payment of the Estate Tax and Surcharge of the Executors.

New Jersey Judges Failed to Uphold Federal Law. Judicial Claims of Lacking Authority to Force the Internal Revenue Service to Collect Taxes Contradict Statute and Congressional Intent.

United States Constitution, Article VI, cls. 2 and 3 provide, respectively, that federal law is supreme, and that all federal and state judges (and attorneys) take an oath to protect and defend the United States Constitution.

Quoting Chief Justice Marshall,

> "...In that regard the decision of the Supreme Court in the recent case of Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967, forcibly recalls that the federal laws are the supreme laws of the land, binding alike upon the courts and the people, and that duties imposed by Congress, even upon state courts, become obligatory. We think the necessary implication is that federal courts may be invoked to prevent conspiracy to interfere with performance of such duties." [Emphasis added.] Quoting from *Osborn v. Bank of US*, 9 Wheat. 738, 6 L.Ed. 204 in *Brewer v. Hoxie School District*, 238 F2d 91 at 101.

Failing to grant certification in the instant case, the New Jersey Supreme Court violated Article VI, cls. 2 and 3. Had those auguste judges recognized that the executors' failure to fund the testamentary trusts created such a large federal tax liability, those jurists were under a

constitutional imperative to reverse the lower court decision, thereby ordering the executors to pay the estate tax in full. State law cannot negate nor override federal law. All states' judges have affirmative duties to examine the federal issues in their courts and take judicial notice of federal law [Art. VI, cls. 2 and 3].

In the instant case, that taxpayers committed a felony was public record. Judges who know of crimes but who take no action violate their oaths and permit criminals to go free.

Without having filed returns, Stang made a mandamus request to demand an IRS assessment of his taxes. Did the *Stang* court have obligations to force Stang to assess himself and pay, since our tax system relies on voluntary compliance? The *Stang* court knew of Stang's not having filed his returns. Ought not that court have taken positive action against Stang for his self-confessed crime? Using the *Cheek* [*supra*] definition of 'willful', the *Stang* court ought have addressed Stang's fraud.

The presence of fraud and tax evasion must be considered when any court makes rulings. These events raise *Badaracco v. Commissioner*, 464 US 386, a tax fraud case, ironically, also from New Jersey. In *Badaracco*, the taxpayer filed a tax return known to be fraudulent, and later, filed a correct amended return. The Supreme Court effectively ruled 'once a fraud, always a fraud'. In his dissent, Justice Stevens raises the issue here presented by the instant cases; to wit,

> "Apparently, the Court believes that taxpayers should be advised to remain silent, hoping the fraud will go undetected, rather than to make

full disclosure in a proper return." *Badaracco v. Commissioner, supra*. at 395. Clearly, the instant cases' fiduciaries prefer Justice Stevens' dissent. Apparently in New Jersey, even after one's tax fraud is a matter of public record - having been exposed in a court of law - the fraud remains undetected: one is not criminally charged, thereby escaping prosecution.

These three New Jersey cases, *Badaracco v. Commissioner*, *I/M/O Estate of Abraham Lichtman*, and *I/M/O Estate of Doris Lichtman*, all deal with tax matters where litigants committed tax fraud. In *Badaracco*, the ability to eliminate the committed fraud was removed from the taxpayer, by the conclusion that once having committed the fraud, the taxpayer cannot undo the act. In contrast *I/M/O Estate of Abraham Lichtman* and *I/M/O Estate of Doris Lichtman*, all the frauds, including the perjury and subornation of perjury, remain, *res judicata*, as lawful acts.

Congress' clear intent was that taxes owed are collected, timely. The instant case and its familial companion prove the awful consequences, when our democratic architecture of carefully designed 'checks and balances' fails; i.e., when all those required to comply with and uphold federal law, refuse.

"[T]he Supreme Court holds that a federal court must make its own inquiry into relevant issues previously decided by a lower state court." *Brown v. US, supra* at 1342.

Without uniform universality of judicial directives, judges and persons subject to Article VI, cl. 2 and 3 do not obey their constitutional

and statutory obligations to enforce federal law with the diligence and rigor Congress intended.

REASONS FOR GRANTING WRIT

The instant case and its familial companion present poignant questions of public importance and federal law, which have not yet been decided by the Supreme Court. State courts, including one of last resort, decided a federal question in conflict with applicable decisions of the United States Supreme Court. Those issues and results warrant Supreme Court review.

CONCLUSION

For all the above reasons, a respectful request is here made that United States Supreme Court grant the petition for writ of certiorari.

Respectfully submitted,

Joan Lichtman
Certified Public Accountant
pro se
Box 1136
Philadelphia, PA 19105
(215) 568 5908

APPENDIX A

Denial of Motion for Reconsideration M-400
September Term 1996, Docket No. 41,828
Dated: November 13, 1996
I/M/O Estate of Doris Lichtman

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion of Joan Lichtman for reconsideration of the petition for certification is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 12th day of November 12, 1996.

/s/ Stephen Townsend
Clerk of the Supreme Court

APPENDIX B

Denial of Petition for Certification, C-972
September Term 1995, Docket No. 41,828
Dated: June 19, 1996
I/M/O Estate of Doris Lichtman

ON PETITION FOR CERTIFICATION

(Joan Lichtman - Petitioner)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2247-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Alan B. Handler, Presiding Justice, at Trenton, this 19th day of June, 1996.

/s/ Stephen Townsend
Clerk of the Supreme Court

APPENDIX C

ORDER ON MOTION

I/M/O Estate of Doris Lichtman
Superior Court of New Jersey
Appellate Division
Docket No. A-002247-94t3
Motion No. M-002245-95
Before Part:A
JUDGE(S): LONG
LOFTUS
DATED: FEBRUARY 8, 1996

MOTION FILED: DECEMBER 18, 1995
BY: JOAN LICHTMAN
ANSWER(S) FILED:

SUBMITTED TO COURT: FEBRUARY 07, 1996

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 8 DAY OF FEBRUARY, 1996 HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT
- FOR RECONSIDERATION DENIED

FOR THE COURT:

/s/ Virginia Long
VIRGINIA LONG P.J.A.D.

APPENDIX D

OPINION OF THE APPELLATE DIVISION

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2247-94T3
I/M/O ESTATE OF DORIS LICHTMAN, deceased
Submitted November 22, 1995
Decided December 7, 1995

Before Judges Long and Loftus.

On appeal from Superior Court, Chancery Division, Probate Part, Morris County

Joan Lichtman, appellant pro se.

Riker, Danzig, Scherer, Hyland & Perretti, attorneys for respondents executors, Cecil Lichtman and Jules Lichtman (Peter F. Eld, of counsel and on the brief.)

M. Carole Duffy, guardian ad litem of Michelle Gluck Lichtman, David Gluck Lichtman and Noah Todd Lichtman, the minor beneficiaries (Schwartz & Duffy, attorneys).

PER CURIAM

Joan Lichtman, a beneficiary of the estate of her mother, Doris Lichtman, here challenges a

determination by Judge Stanton disallowing exceptions she filed to an accounting for the administration of the estate by the trustees, her father and uncle. She claims that the trustees breached fiduciary duties owed the estate and its beneficiaries. More particularly, Ms. Lichtman asserts that the trustees jointly or severally breached their fiduciary responsibilities by not completing the creation of the two trusts set forther in the will resulting in adverse tax consequences, and by arbitrarily distributing income. She contends that Judge Stanton erred in approving the accounting under these circumstances.

We have carefully reviewed this record in light of these contention and have concluded that our intervention is unwarranted. Judge Stanton undertook a detailed review of each of Ms. Lichtman's exceptions and found them to be without merit. We affirm substantially for the reasons expressed by him in his thoughtful and thorough oral opinion of October 14, 1994.

APPENDIX E

JUDGMENT ON ACCOUNTING
I/M/O ESTATE OF DORIS LICHTMAN
DATED: NOVEMBER 15, 1994
SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
PROBATE PART: MORRIS COUNTY

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
(201) 538-0800
Attorneys for Plaintiffs

Civil Action - JUDGMENT ON ACCOUNTING

This matter having been opened to the Court on October 14, 1994 by Riker, Danzig, Scherer, Hyland & Perretti, attorneys for Cecil Lichtman and Jules Lichtman, Executors of the Estate of Doris lichtman, deceased, Peter F. Eld, Esq., appearing, in the presence of M. Carole Duffy, Esq., guardian ad litem for Michelle Gluck Lichtman, David Gluck Lichtmand and Noah Todd Lichtman, minors, and also in the presence of Fox & Fox, attorneys for defendant, Joan

Lichtman, Alfred V. Acquaviva, Esq.[1], appearing;

And it appearing that copies of the order to show cause made herein on August 17, 1994, returnable October 14, 1994 and of plaintiffs' complaint with their account annexed hereto have been duly served upon the parties defendant named in the said order to show cause in the manner and time as therein directed at their post office addresses as shown in plaintiffs' complaint;

And it appearing that the Surrogate has audited and stated the first and final account of Cecil Lichtman and Jules Lichtman, as Executors of the Last Will and Testament of Doris Lichtman, deceased, covering the period from December 26, 1988 through December 31, 1993 and placed the same on the files of his office and has reported the same to this Court for allowance and settlement;

And it further appearing that M. Carole Duffy, Esq., was appointed guardian ad litem for Michelle Gluck Lichtman, David Bluck Lichtman and Noah Todd Lichtman, minors, by Order of this Court entered on September 11, 1994 and has reported to this Court her approval of the said account;

And it further appearing that defendant, Joan Lichtman, has filed exceptions and

[1]. Mr. Acquaviva appeared on behalf of Joan Lichtman at the hearing on october 14, 1994. The Court notes that Mr. Acquaviva and his firm do not generally represent Ms. Lichtman in connection with this estate. /s/ RS, A.J.S.C.

objections to the said account and that plaintiffs, Cecil Lichtman and Jules Lichtman, as Executors as aforesaid, have filed a; motion to dismiss the said exceptions/objections as insufficient in law;

And the Court having considered the exceptions, the moving papers in support fo plaintiffs' motion to dismiss the exceptions and objections and the response of defendant, Joan Lichtman, as well as the arguments of counsel and the guardian ad litem and being of the opinion that the exceptions and objections of defendant, Joan Lichtman, raise no issues requiring a further hearing, all as more fully set forth in the record hereof in open Court on October 14, 1994;

And it further appearing that the Court has examined the said account and found the same to be correct and that plaintiffs have withdrawn their request for allowance of income and corpus commissions; and for good cause shown;

IT IS, on this 15 day of November, 1994 ORDERED and ADJUGED:

1. That the first and final account of the plaintiffs, Cecil Lichtman and Jules Lichtman, as executors of the Last Will and Testament of Doris Lichtman, deceased, covering the period from December 26, 1988 through December 31, 1993, be and is in all things hereby approved and allowed as stated;

2. That plaintiffs having withdrawn their request for allowance of income and corpus commission, no income or corpus commissions are hereby allowed;

3. That there is hereby allowed to Riker, Danzig, Scherer, Hyland & Perretti, attorneys for plaintiffs, an attorneys' fee of $15,000.00, of which $8,241.00 has been heretofore paid and taken, leaving a balance due thereon of $6,759.00;

4. That there is hereby allowed to M. Carole Duffy, Esq., as guardian ad litem for Michelle Gluck Lichtman, David Gluck Lichtman and Noah Todd Lichtman, minors, a fee of $704.00.

/s/ Reginald Stanton
Reginald Stanton, A.J.S.C.[1]

Judge Stanton's hand-written addendum, denying the defendant's motion for reconsideration, follows:

The Court has reviewed all of the papers submitted by Joan Lichtman after the hearing on October 14, 1994. The Court has decided to deny ms. Lichtman's motion for reconsideration without scheduling any oral argument or any evidentiary hearing on that motion. The motion is clearly without merit. In reaching its judgement (sic) in this case, this Court considered all of the relevant and material factors. The motion for reconsideration adds nothing new which is significant. The accounting is correct. It was properly

[1]. Ms. Lichtman's motion for reconsideration was filed PRIOR to Judge Stanton's signing the written judgment. So, the judge added his hand-written denial of that reconsideration motion.

approved. If Ms. Lichtman is not satisfied with that result, she should pursue her appellate remedies.

The Court also notes that the will of Abraham Lichtman differs very materially in hits terms from the will of the present testatrix, Doris Lichtman, and rulings which were appropriate with respect to Abraham Lichtman's will are not relevant in the present case.

/s/ Reginald Stanton
Reginald Stanton
Judge of the Superior Court
Assignment Judge

APPENDIX F
Texts of Statutes Cited

United States Constitution
Article VI
Clause 2 Supreme Law

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

Clause 3 Oath of Office

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office of public Trust under the United States."

5 CFR § 2635.101(b)(8)
"Employees shall act impartially and not give preferential treatment to any private organization or individual."

26 CFR § 301.7214-1

"Any officer or employee of the United States acting in connection with any revenue law of the United States required to make a written report under the provisions of section 7214(a)(8) shall submit such report to the Commissioner, or to a regional commissioner or district director."

20 *Fed. Proc. L. Ed.* 700 § 48:1241

"26 U.S.C.S. § 7421(a) does not prevent the institution of an injunction action which challenges a tax exemption ruling in favor of another taxpayer and which therefore has the effect of attempting to compel the government to collect a larger amount of taxes rather than a smaller amount. However, the plaintiffs in such actions may have difficulty demonstrating standing; they must demonstrate that they have suffered a distinct and palpable injury, that the source of the injury is the contested revenue ruling or other IRS action, and that the invalidation of the IRS action would alleviate the injury."

Internal Revenue Manual MT 4392

Processing Information Discovered After an Estate Tax Case is Closed
(1) Facts which were unknown when an estate tax case was closed, may later be reported to the Service or discovered by an examiner. This information should be trnasmitted to the

Director of the Service Center where the estate tax return was required to be filed.
(2) The new information should be processed by the Examination function as an informal claim if the facts subvmitted by the taxpayer reduce the assessed estate tax liability. ...
(4) An assessment of additional estate tax based on information discovered by an examiner is subject to the provision of (23)40 IRM 4350 concerning the reopening of closed cases. Any estate tax return is considered to be closed when an Estate Tax Closing Letter has been issued. This includes estate tax returns accepted as filed or closed by survey procedures. IRM 4023.4

New Jersey Statutes

Civil Procedure Rule 4:87-7

A Guardian ad litem for a minor or incompetent shall file a written report with the court at least 7 days prior to the day on which tne account is settled. If the guardian applies for the allowance of a fee in excess of $1,000 the report shall include, or be accompanied by, an affidavit of services. Notice of all applications for allowances shall be given as provided by *R.* 4:26-2(c).

N.J.S. 54:37-8

No executor or administrator shall be entitled to a judgment settling his final account or to a discharge in any court of this State unless he has complied with the provisions of Section 54:37-5 of this title.

N.J.S. 54:38-5

All taxes imposed by this chapter shall become due at the date of death of the decedent and if not paid before the expiration of eighteen months from the date of death of the decedent shall bear interest at the rate of six per cent per annum from the expieration of said eighteen months until paid. The state tax commissioner may, for cause shown, extend the time for payment with our without interest for such period as the circumstances, in his discretion, may require and the failure of the federal government to finally determine the amount of estate tax due within said period of eighteen months or the subsequent assessment of an additional or increased estate tax shall always be sufficient grounds for the waiving of interest until the tax has been definitely determined by the government.

N.J.S. 54:38-11

The tax imposed by this chapter shall be paid out of the same funds as those from which federal estate taxes are payable.

N.J.S. 3B:10-23

A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and applicable law, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by law, the terms of the will, if any, and any order in proceedings to which he is a party for the best interests of successors to the estate.

N.J.S. 3B:10-28

A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and do so without adjudication, order, or direction of a court, but he may invoke the jurisdiction of a court, in proceedings authorized by law to resolve questions concerning the estate or its administration.

N.J.S. 3B:17-8

A judgment allowing an account, including a guardian's intermediate account, after due notice, shall be red adjudicata as to all exceptions which could or might have been taken to the account, and shall constitute an approval of the correctness and propriety of the account, the legality and properiety of

the changes in investments or other assets, and the legality and propriety of other matters, and also shall exonerate and discharge the fiduciary from all claims of all interested parties and of those in privity with or represented by interested parties except:

a. For the investments and other assets in the fiduciary's hands at the close of the period covered by the account, and assets which may come into his hands after the close of the account;
b. Insofar as exceptions to the account shall be taken and sustained; and
c. As relief may be had from a judgment in any civil action.

5 U.S.C. § 701(a)

This chapter [5 U.S.C. §§ 701 et seq.] applies, according to the provisions thereof, except to the extent that--
(1) statutes preclude judicial review; or,
(2) agency aciton is committed to agency discretion by law.

5 U.S.C. § 706 states,

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of agency actions. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title
or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial do novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

28 U.S.C. § 1361

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer of employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Internal Revenue Code

26 U.S.C. 663(c)

For the sole purpose of determining the amount of distributable net income in the application of sections 661 and 662, in the case of a single trust having more than one beneficiary, substantially separate and independent shares of different beneficiaries in the trust shall be treated as separate trusts. The existence of such substantially separate and independent shares and the manner of treatment as separate trusts, including the application of subpart D, shall be determined in accordance with regulations prescribed by the Secretary.

26 U.S.C. § 678(a)

(a) A person other than the grantor shall be treated as the owner of any portion of a trust with respect to which:

(1) such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself, or

(2) such person has previously partially released or otherweise modified such a power and after the release or modification retains such control as wouold within the principles of sections 671 to 677, inclusive, subject a grantor of a trust to treatment as the owner thereof.

26 U.S.C. § 2002

"The tax imposed by this chapter [Subtitle B, 1986 Code] shall be paid by the executor."

26 U.S.C. § 2031(a)

The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

26 U.S.C. § 2044(a) "General Rule.--

The value of the gross estate shall include the value of any property to which this section applies in which the decedent has a qualifying income interest for life."

26 U.S.C. § 2056(a)

For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsection (b), be determined by deduction from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate."

26 U.S.C. § 2056(b)(1) and (7) state,

"Limitation in the Case of Life Estate or Other Terminable Interest.--

"(1) General Rule.--Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest--

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse.

"(7) Election with respect to life estate for surviving spouse.--

(A) In General.--In the case of qualified terminable interest property--

(i) for purposes of subsection (a), such property shall be
treated as passing to the surviving spouse, and

(ii) for purposes of paragraph (1)(A), no part of such property shall be treated as passing to any person other than the surviving spouse.

(B) Qualified Terminable Interest Property [QTIP] defined.--

(i) In General.--The term 'qualified terminable interest property' means property--

(I) which passes from the decedent,

(II) in which the surviving spouse has a qualifying income interest for life, and

(III) to which an election under this paragraph applies.

(ii) Qualifying Income Interest for Life.-- The surviving spouse has a qualifying income interest for life if--

(I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and

(II) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Subclause (II) shall not apply to a power exercisable only at or after the death of the surviving spouse. To the extent provided in regulations, an annuity shall

be treated in a manner similar to an income interest in property (regardless of whether the property from which the annuity is payable can be separately identified).

(iii.) Property includes interest therein.--The term 'property' includes an interest in property.

(iv.) Specified portion treated as separate property.--A specific portion of property shall be treated as separate property.

(v.) Election.--An election under this paragraph with respect to any property shall be made by the executor on the return of tax imposed by section 2001. Such an election, once made, shall be irrevocable."

26 U.S.C. § 2204(a)

"GENERAL RULE--If the executor makes written application to the Secretary for determination of the amount of the tax and discharge from personal liability therefor, the Secretary (as soon as possible, and in any event within 9 months after the making of such application, or, if the application is made before the return is filed, then within 9 months after the return is filed, but not after the expiration of the period prescribed for the assessment of the tax in section 6501) shall notify the executor of the amount of the tax. The executor, on payment of the amount of which he is notified (other than any amount

the time for payment of which is extended under section 6161, 6163, 6166), and on furnishing any bond which may be required for any amount for which the time for payment is extended, shall be discharged from personal liability for any deficiency in tax thereafter found to be due and shall be entitled to a receipt of writing showing such discharge."

26 U.S.C. § 2205

"REIMBURSEMENT OUT OF ESTATE. If the tax or any part thereof is paid by, or collected out of, that part of the estate passing to or in the possession of any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons who interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purposes and intent of this chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

26 U.S.C. § 6075(a)

"Returns made under section 6018(a) (relating to estate taxes) shall be filed within 9 months after the date of decedents death."

26 U.S.C. § 6161(b)(2)

"Under regulations prescribed by the Secretary, the Secretary may *for reasonable cause*, extend the time for payment of any deficiency of a tax imposed by chapter 11 for a reasonable period not to exceed 4 years from the date otherwise fixed for the payment of the deficiency."

26 U.S.C. § 6161(b)(3)

"No extension shall be granted under this subsection for any deficiency if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with an intent to evade tax."

26 U.S.C. §§ 6201(a) and 6201(a)(1)

"The Secretary is authorized and required to make the inquiries, determination, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law.

Such authority shall extend to and include the following:

(1) TAXES SHOWN ON RETURN.--The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title."

26 U.S.C. § 6203

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.

26 U.S.C. § 6211(a) defines a deficiency.

"For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, or 44 the term 'deficiency' means the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44 exceeds the excess of--

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over--

(2) the amount of rebates, as defined in subsection (b)(2), made."

26 U.S.C. § 6213(b)(1)

"If the taxpayer is notified that, on account of a mathematical or clerical error appearing on the return, an amount of tax in excess of that shown on the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical or clerical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section 6212(c)(1) (restricting further deficiency letters), or of section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section. Each notice under this paragraph shall set forth the error alleged and an explanation thereof."

26 U.S.C. § 6213(g), Definitions,

For purposes of this section --

"(2) Mathematical or Clerical Error -- The term 'mathematical or clerical error' means--

(C) an entry on a return of an item which is inconsistent with another entry of the same of another item on such return, ...

(E) an entry on a return of a deduction or credit in an amount which exceeds a statutory limit imposed by

Subtitle A or B, of chapter 41, 42, 43, or 44, is such limit is expressed--

(i) as a specified monetary amount, or

(ii) as a percentage, ratio, or fraction,

and if the items entering into the application of such limit appear on such return."

26 U.S.C. § 6301

The Secretary shall collect the taxes imposed by the internal revenue laws.

26 U.S.C. § 6324(a)

Except as otherwise provided in subsection (c)--

(1) UPON THE GROSS ESTATE--Unless the estate tax imposed by chapter 11 is sooner paid

in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

(2) LIABILITY OF TRANSFEREES AND OTHERS--If the estate tax imposed by chapter 11 is not paid when due, then the spouse, transferee, trustee (except the trustee of an employees' trust which meets the requirements of section 401(a)), surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under sections 2034 to 2042, inclusive, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property transferred by (or transferred by a transferee of) such spouse, transferee, trustee, surviving tenant, person in

possession, of beneficiary, to a purchaser or holder of a security interest shall be divested of the lien provided in paragraph (1) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, or transferee of any such person, except any part transferred to a purchaser of a holder of a security interest.

(3) CONTINUANCE AFTER DISCHARGE OF FIDUCIARY--The provisions of section 2204 (relating to discharge of fiduciary from personal liability) shall not operate as a release of any part of the gross estate from the lien for any deficiency that may thereafter be determined to be due ...

26 U.S.C. § 6331(a)

"If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee or elected official, of the United

States, the District of Columbia, or any agency or instrumentality of the United States of the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401 (d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section."

26 U.S.C. § 6501(a)

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed or after the date prescribed) or, if the tax is payabale by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

26 U.S.C. 6501(c), Exceptions,

(1) False Return. In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) Willful Attempt to Evade Tax. In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceedings in court for the collection of such tax may be begun without assessment, at any time."

26 U.S.C. § 6601(a)

"If any amount of tax imposed by this title (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the
underpayment rate established under section 6621 shall be paid for the period from such last date to the date paid."

26 U.S.C. § 6694

Understatement of taxpayer's liability by income tax return preparer

(a) Understatements Due to Unrealistic Positions.--If--

(1) any part of any understatement liability with respect to any return or claim for refund is due to a position for which there was not a realistic possibility of being sustained on its merits,

(2) any person who is an income tax return preparer with respect to such return or claim knew (or reasonably should have known) of such position, and

(3) such position was not disclosed as provided in section 6662(d)(2)(B)(ii) or was frivolous,such person shall pay a penalty of $250 with respect to such return or claim unless it is shown that there is reasonable cause for the understatement and such person acted in good faith.

"(b) Willful or Reckless Conduct.--

If any part of any understatement of liability with respect to any return or claim for refund is due--

(1) to a willful attempt in any manner to understate the liability for tax by a person who is an income tax return preparer with respect to such return or claim, or

(2) to any reckless or intentional disregard of rules or regulations by any such person, such person shall pay a

penalty of $1,000 with respect to such return or claim. Within respect to any return of claim, the amount of the penalty payable by any person by reason of this subsection shall be reduced by the amount of the penalty paid by such person by reason of subsection (a)."

26 U.S.C. §§ 6701

(a) Any person--
(1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document,
(2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and
(3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person,shall pay a penalty with respect to each such document in the amount determined under subsection (b).

(b) (1) Except as provided in paragraph (2), the amount of the penalty imposed by subsection (a) shall be $1,000.

....

(d) Subsection (a) shall apply whether or not the undrstatement is with the knowledge or consent of the persons

authorized or required to present the return, affidavit, claim, or other document.

26 U.S.C. § 7201

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7202

"Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

26 U.S.C. § 7206

Any person who--

(1) Willfully makes and subscribes any return, statement, or other

document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return affidavit, claim or other document, which is fraudulent or is false as to any material matter, whether or not such falsify or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document.

26 U.S.C. § 7214(a)

"Any officer or employee of the United States acting in connection with any revenue law of the United States

(3) who with intent to defeat the application of any provision of this title fails to perform any of the duties of his office or employment; or
(4) who conspires or colludes with any other person to defraud the United States; or,
(5) who knowingly makes opportunity for any person to defraud the United States; or,
(6) who does or omits to do any act

with intent to enable any other person to defraud the United States; or,

(8) who, having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law, fails to report, in writing, such knowledge or information to the Secretary; or ...

shall be dismissed from office of discharged from employment annd, upon conviction thereof, shall be fined not more than $10,000, or imprisioned not more than 5 years, or both. "The court may in its discretion award out of the fine so imposed an amount not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured to be collected by execution."

26 U.S.C. § 7403(a)

In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this titles which respect to such tax or liability

or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such a tax or liability. For the purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

26 U.S.C. §7421(a)

"Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

Other Authorities

Butler, Paul J.
"Anti-Injunction Act Does Not Bar Action Challenging Revenue Ruling When Nontaxpayer Seeks to Impose Tax Liability", *24 Emory L. J.* 1191

"The Anti-Injunction Act prohibits a suit for the purpose of restraining the assessment of collection of any tax." [*Id.*, 1192]

"In effect the Court merely restated the grounds upon which an injnuction would be granted - no legal remedy plus irreparable harm". [*Id.*, 1193]

"Anti-Injunction Act was not intended to bar actions which do not threaten the collection of revenues." [*Id.*, 1200]

"The balance of protecting the system of revenue collecting against the rights of an aggrieved taxpayer to challenge an alleged illegality should be struck in favor of the taxpayer. If the Acts were interpreted as broadly as the government argues an aggrieved taxpayer in an EKWRO situation would be totally precluded from judicial review of the alleged error because hs is not the taxpayer and cannot sue for a refund." [*Id.*, 1203]

"Nor should sovereign immunity automatically bar an action which seeks to impose rather than negate a tax. ... [T]here is merit in the argument that the Administrative Procedure Act should be deemed a waiver of the sovereign immunity doctrine and should be invoked as an alternative to leaving the aggrieved party without a remedy. The need for an aggrieved taxpayer to bring an alleged illegality before a judicial tribunal comports with the purpose of the Administrative Procedure Act itself."*Id.*1204

APPENDIX G

Transcript, United States Tax Court
Docket No. 25983-91
Joan Lichtman v. Commissioner of Internal Revenue

Room 1320
841 Chestnut Street
Philadelphia, Pennsylvania 19107
Monday, March 23, 1992

The above-entitled matter came on for calendar call, pursuant to notice.
BEFORE: THE HONORABLE JOHN J. PAJAK
Special Trial Judge

On behalf of the Petitioner:
Steven Jay Jozwiak, Esquire
On behalf of the Respondent:
Lisa Primavera-Femia, Esquire

PROCEEDINGS

The Clerk: Page five of the calendar, docket number 25983-91, Joan Lichtman.

Mr. Jozwiak: Good morning, Your Honor. Steven Jozwiak on behalf of the Petitioner.

The Court: Mr. Jozwiak.

Ms. Femia: Lisa Primavera-Femia for the Respondent. Good morning, Your Honor.

The Court: Good Morning.

Ms. Femia: Well, Your Honor, I don't know what to make of this case. Respondent thought it was settled some time ago based on a full concession by the Respondent. Petitioners would rather not accept our concession, apparently.

Mr. Jozwiak: Your Honor, the problem is that counsel is not willing to enter into a closing agreement in light of the fact that this case involves distributions from a trust, which is an ongoing effect in subsequent years, and we'd like to have this matter resolved at this time, so we don't end up here for subsequent years 1985, '86, '87.

Rather than just dismissing it stating no reason, we wold like the reason set forth in a closing agreement as to the reason it's being dismissed, sc it's not a recurring case every year that we have to be back before the Court.

Ms. Femia: Well, Your Honor, from my discussion with the appeals officer who considered this case, he didn't believe that there was any reason for a closing agreement and that there were no continuing tax issues.

I understand that the reason that Petitioner wants the closing agreement is because of some effect it may have on some other litigation that she is pursuing in another forum, but this is completely unrelated to tax issues.

Mr. Jozwiak: That's not correct, Your Honor. It's partially correct.

There is other litigation going on, but there are subsequent distributions in future years from the year at issue right now, and true as we're standing here, we'll be standing here next year if we can't get this resolved.

The Court: Let's do this: Why don't you read the basis of the settlement into the record? We can dismiss this case this year. If it comes up next year, we'll have a copy of that record to bring to the next judge, and he or she can make whatever decision they deem appropriate.

Ms. Femia: Well, again, Your Honor, I'd rather not do that. I don't think that's appropriate in this case. I don't think the Respondent --

The Court: Is this a secret case?

Ms. Femia: No, Your Honor. I just don't think the Respondent needs to make known the reason for -- for

concession. We conceded it, and you know, it's a matter of -- of -- of government decision, Your Honor.

I think that's -- there -- there is a qualified privilege involved here, also.

The Court: Well, I think we've got enough on the record to indicate that, if they are going to come back and not be consistent next year, you have got something to bring forward to another judge, and I think you ought settle this case right now and have the decision entered? (sic)

Mr. Jozwiak: Can I discuss this with --

The Court: I can't force them to enter into a closing agreement. I only have jurisdiction over the years before me, as you well know.

Mr. Jozwiak: Okay.

The Court: I was trying to do a little more.

Mr. Jozwiak: Can I discuss this with Counsel?

The Court: You may.

Ms. Femia: Yes, we'll recall it at the end of the calendar.

[Whereupon, the calendar call was adjourned.]

The above-entitled matter came on for recall, pursuant to notice.

The Clerk: Docket Number 25983-91, Joan Lichtman.

Mr. Jozwiak: Your Honor, again, I would repeat my request to have the record state the reasons for the concession by District Counsel.

There are multiple trust returns and multiple trusts involved, all with individual returns, that all relate to this particular matter, in subsequent years, prior years.

The Petitioner has 1979 that is a year that's open, all stemming around the issues that are in the notice of deficiency, and we fell it's imperative that the record state the reason for the dismissal.

Ms. Femia: Your Honor, Lisa Primavera-Femia for the Respondent.

Respectfully, Your Honor, I would decline to state the reasons for the Respondent's concession.

First of all, the deliberative process of Government agencies is protected by qualified privilege, which goes to the opinions and recommendations of administrative officials.

Second, Your Honor, Rule 408 of the Federal Rules of Evidence protect statements and conversations in settlement negotiations, which is essentially what Petitioner wants us to reveal here.

Your Honor, I would just ask that the Court enter a decision that reflects no deficiency due in income tax from the Petitioner for the years 1981 and 1984.

Mr. Jozwiak: Again, Your Honor, we would object to that, and if that be the case, Your Honor, what with Respndent's position, we would also want the record to reflect that we would be willing to make a draw and waive our statute of limitations defense that was raised in the petition.

The Court: They are conceding there is no deficiency. It's moot. Are you going to sigh the stipulated decision as to no deficiency or not? If they're saying they agree that you don't owe anything for '81 and '84, that's the only jurisdiction I have.

Mr. Jozwiak: Your Honor, Petitioner would like the Court to enter an order requiring the reason for the concession.

The Court: If we did that, the Court would get bogged under, very frankly,

and I don't think I have authority to do that anyway, and it wouldn't make sense.

If you're not going to enter a stipulated decision, I am going to ask Respondent to make a motion for failure to properly prosecute.

Mr. Jozwiak: Your Honor, can I have one moment, please?

The Court: You may.

[Discussion held off the record.]

Mr. Jozwiak: Your Honor, Petitioner has indicated to me that she cannot sign the stipulation in good conscience, Your Honor, that to allow this to go through would basically permit what's perceived to be a fraud by letting these other people escape without paying income tax.

The Court: You've made your record, sir. Make your motion.

Ms. Femia: Yes, Your Honor. I'd like to ask the Court to dismiss this case for failure to properly prosecute and to enter a decision in the amounts of zero deficiency for the years 1981 and 1984.

The Court: For good cause shown on the record, your motion will be granted. We well enter a zero deficiency for the taxable years

(sic) 1981 and a zero deficiency for the taxable year 1984.

Ms. Femia: Thank you, Your Honor.

Mr. Jozwiak: Thank you, Your Honor.

[Whereupon, the recall was adjourned.]

No. 95-1570

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOAN LICHTMAN,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee

JOAN LICHTMAN,
Appellant

ON APPEAL FROM THE ORDER OF
THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE APPELLANT

Howard M. Soloman, Esquire
Abrahams, Loewenstein, Bushman &
Kauffman, P.C.
One Liberty Place, Suite 3100
1650 Market Street
Philadelphia, PA 19103-7392
(215) 561-1030
Attorneys for Appellant
Joan Lichtman

TABLE OF CONTENTS

	Page
Statement of subject matter and appellate jurisdiction	1
Statement of the issue	2
Statement of the case	2
Statement of the facts	3
Statement of related cases and proceedings	8
Statement of standard or scope of review	8
Argument	8
1. Introduction and Statute of Limitations General Principles	8
2. There was a determination within the meaning of the mitigation provisions	12
3. The determination falls within the circumstances of adjustment specified in the mitigation provisions	14
4. The Internal Revenue Service has maintained an inconsistent position	17
5. Summary	20
Conclusion	22
Certification of Bar Membership	24
Certificate of Service	25
Addendum - Memorandum and Order Filed May 24, 1995	26

CITATIONS

Cases: App. Page

Beneson et. al. v. United States,
567 F. Supp. 101 (D.C. NY 1966),
aff'd, 385 F.2d 26 (2d Cir. 1967) 65

Brounstein v. United States,
979 F.2d 952 (3d Cir. 1992) 58

Chertkof v. Commissioner,
649 F.2d 264, 267 (4th Cir. 1981) 60, 70

First Nat. Bank of Omaha v. United States,
565 F.2d 507 (8th Cir. 1977) 71, 74

Kappel's Estate v. Commissioner,
615 F.2d 91 (3d Cir. 1980) 61

MacDonald v. Commissioner,
17 T.C. 934, 941 (1951) 69

Albert W. Priest Trust,
6 T.C. 221 (1947) 72

United States v. Rosenberger,
235 F.2d 69, 73 (8th Cir. 1956) 60, 71

Statutes:

Internal Revenue Code of 1986 (26 U.S.C.):

Sec. 662	.....	56
Sec. 665-668	.....	54,72
Sec. 678	.....	56
Sec. 1311-1314	.....	Passim
Sec. 6511	.....	51,52,59, 60,61,74
Sec. 6513	.....	59
Sec. 7121	.....	63
Sec. 7422	.....	51,59

28 U.S.C.:

Sec. 1291	.....	51
Sec. 1346	.....	51
Sec. 1491	.....	51

Miscellaneous:

Rule 56 of the Federal Rules of Civil Procedure .. 58

Rule 142 of the Rules of Practice and Procedure of the United States Tax Court .. 64

S. Rep. No. 1567, 75th Cong., 3d Sess. (1938) p. 49 70

Treasury Regulation Section 1.1311 ... 63

STATEMENT OF SUBJECT MATTER AND APPELLANT JURISDICTION

This civil action for the refund of income taxes was brought by Joan Lichtman ("Taxpayer") against the United States of America. Taxpayer maintains that the District Court had jurisdiction over her claim by reason of 28 U.S.C. §§ 1346 and 1491(a)(1), and Section 7422 of the Internal Revenue Code of 1986 (26 U.S.C.)(hereinafter referred to as "the Code").

By Order dated May 23, 1995, the District Court (Judge Clarence C. Newcomer) entered its order granting the United States' Motion for Summary Judgment. The District Court concluded that it lacked jurisdiction over Taxpayer's suit for refund because Taxpayer's administrative claim for refund was not filed timely. Taxpayer filed a timely notice of appeal on July 7, 1995. This Court has jurisdiction pursuant to 28 U.S.C., Section 1291.

STATEMENT OF THE ISSUE

Whether the District Court correctly found that it lacked jurisdiction over Taxpayer's claim for refund of income tax paid where Taxpayer's claim for refund, although filed outside of the limitations period of Section 6511 of the Code, should be deemed timely filed pursuant to the ameliorative mitigation provisions of Sections 1311-1314 of the Code.

STATEMENT OF THE CASE

Taxpayer filed a claim for refund of income taxes for the tax year 1979. (A. 155-156.) While Taxpayer's claim for refund was filed outside of the three year limitations period set out in Code Section 6511, Taxpayer asserted that her claim for refund nonetheless was timely by virtue of the ameliorative mitigation provisions of Code Section 1311, et. seq., which provide relief from the general three year limitations period of Code Section 6511 in certain circumstances.

On Motion for Summary Judgment, the District Court entered judgment for the Government, concluding that Taxpayer failed to satisfy all of the requirements for mitigation. At issue on appeal is whether this case falls within the mitigation provisions of the Code.

STATEMENT OF THE FACTS

Taxpayer is a beneficiary of a trust created under the Will of Abraham Lichtman, who died on October 20, 1968 ("the Trust").[1] Abraham

[1] Seven trusts were created under the Will of Taxpayer's grandfather. There was one trust for each of Abraham Lichtman's grandchildren, giving the grandchild and his or her father (Jules or Cecil Lichtman) the right to income distributions.

Lichtman was Taxpayer's grandfather. The trustees of the Trust are Jules Lichtman and Cecil Lichtman (hereinafter referred to as the "Trustees" or "Lichtman Brothers"), who are Taxpayer's uncle and father, respectively. (See generally A. 35-49.)

The Lichtman Brothers were designated as trustees of the Trust, together with "such corporate institution as they shall choose to act with them." (A. 47-49.) However, no corporate trustee ever was appointed. The Lichtman Brothers, therefore, had unfettered control over the Trust, and over all of the other similarly situated trusts created under the Will of Taxpayer's grandfather.

Pursuant to the terms of the Trust, Taxpayer is the sole principal beneficiary of the Trust. The Trust provides that principal distributions are to be made as follows (A. 47-48): One-third to Taxpayer when she reached the age of 35 (December 8, 1978), one-half of the then remaining principal balance to Taxpayer when she reached the age of 40 (December 8, 1983), and the remainder to Taxpayer when she reached the age of 45 (December 8, 1988). Only the first two principal distributions, which were received in 1979 and 1984, are relevant here. In addition, principal distributions of up to five thousand dollars ($5,000) per year were authorized to the extent necessary for Taxpayer's health, welfare, maintenance, support and education.

With respect to income distributions, the Trust provides that the Trustees are authorized

"in their sole, uncontrolled and unreviewed discretion" to make income distributions to Taxpayer as required "to provide for her welfare, maintenance, support and education." (A. 48.) Virtually all of the income of the Trust was distributed to Cecil Lichtman, Taxpayer's father, who also was a permissible income beneficiary. As no corporate fiduciary had been appointed, the decision to distribute income to Cecil Lichtman was made by Jules Lichtman. Of course, there was a reciprocal arrangement in those trusts for the benefit of Jules Lichtman's children.

In preparing the Trust's 1979 fiduciary income tax return, the Trustees issued a Form K-1, Beneficiary's Share of Income, Deductions, Credits, etc., to Taxpayer to account for the principal distribution to Taxpayer, treating the distribution as if it were an income distribution for tax purposes. (A. 51-52.) The Form K-1 charged Taxpayer with dividend and interest income totalling $19,803, which Taxpayer included in her taxable income on her individual income tax return for 1979. The inclusion of the $19,803 in Taxpayer's income resulted in federal income tax of $5,860.

In addition, because the Trustees reported to the IRS that the amounts distributed consisted of previously undistributed net income (See A. 56), Taxpayer paid additional income tax of $8,366 pursuant to Code Sections 665-668, commonly referred to as the "throwback rules." Taxpayer therefore paid a total of $14,226 federal income tax for 1979 as a result of the principal distribution. (See A. 63-72.)

In preparing the Trust's 1984 fiduciary income tax return, the Trustees again issued a Form K-1 to Taxpayer to account for the principal distribution to Taxpayer as if it were income to the beneficiary. That Form K-1 charged Taxpayer with income totalling $8,188, which Taxpayer did not include on her individual income tax return. Instead, Taxpayer attached a statement to her 1984 individual income tax return explaining that the distribution was not taxable, because it was a principal distribution. Taxpayer therefore did not report any current income or accumulated income under the throwback rules. (A. 74.)

On August 15, 1991, the Internal Revenue Service issued a statutory notice of deficiency to Taxpayer relating to the 1984 tax return.[2] (See A. 170-177.) The sole basis for the notice of deficiency was Taxpayer's failure to include in her income the Trust income reported on the Schedule K-1 for 1984. Taxpayer timely filed a petition to the United States Tax Court seeking a redetermination of the Commissioner's determination.

[2] Because the alleged deficiency was in excess of twenty-five percent of the gross income reported by Taxpayer on her 1984 tax return, the IRS had six years from the filing of the tax return to mail the notice of deficiency. See Code Section 6501(e)(1)(A). Taxpayer's 1984 income tax return was filed on September 17, 1985, and therefore the statutory notice of deficiency, issued August 15, 1991, was timely.

The United States Tax Court, in a decision entered April 9, 1992 (Special Trial Judge John J. Pajak), determined that there was no deficiency in Taxpayer's 1984 federal income tax. Accordingly, the Tax Court determined that the principal distributions from the Trust were not includible in Taxpayer's taxable income. The Commissioner, however, refused in that proceeding to state the reasons for conceding that the Taxpayer's tax return position was correct. The Commissioner further refused Taxpayer's request to read the basis of the settlement into the record. (See A. 158-168.)

As a result of the Tax Court's decision, and in any event, in accordance with the income tax laws pertaining to trust income, the income of the Trust properly is taxable to Cecil Lichtman, who received the income from the Trust. See generally Code Sections 662 and 678. Moreover, because the Tax Court determined that the principal distributions to Taxpayer were not taxable to Taxpayer, the throwback rules do not apply to Taxpayer. The Tax Court's determination, in essence, had the legal effect of increasing the amounts that were taxable to Cecil Lichtman as income distributions from the Trust because the income from the Trust, including income that previously was charged to Taxpayer as undistributed income, should have been charged to Cecil Lichtman.

In other words, by characterizing principal distributions made to Taxpayer as distributions of income subject to the throwback rules, the Trustees understated the balance of undistributed net income, thereby reducing the income

distribution deductions claimed by the Trust for the years in which Cecil Lichtman took income distributions. This had the effect of reducing the income taxable to the true beneficiary of the income from the Trust, Cecil Lichtman, since the amounts reflected on the Schedules K-1 issued to Cecil Lichtman would have included income distributions only to the extent of the undistributed net income. Taxpayer, on repeated occasions, sought to bring the Trustees' understatement of income to the attention of the Internal Revenue Service. Unfortunately, Taxpayer has not met with much success. (See generally A. 76-112.)

Following the April 1992 Tax Court proceeding involving the Schedule K-1 issued to Taxpayer by the Trust for 1984, Taxpayer filed a claim for refund, in the form of an amended income tax return for 1979, asserting that the distributions from the Trust totalling $19,803 were improperly included in her income for 1979 and that the additional tax due to the application of the throwback rules was improperly asserted against her ("Claim"). That Claim was denied (see A. 179-181), and Taxpayer brought this refund action.

In the District Court, Taxpayer asserted that her claim for refund was timely, pursuant to the mitigation provisions of Section 1311-1314 of the Code. For the mitigation provisions to apply, (1) there must be a determination, as defined by Code Section 1313(a); (2) the determination must fall within one of six circumstances of adjustment enumerated in Code Section 1312; (3) the correction of the error must be prevented by

the operation of law, and (4) an inconsistent position must be maintained by the party against whom the mitigation provisions will apply.

The District Court entered judgment for the Government, finding that Taxpayer "cannot meet the fourth requirement above." (A. 8.) In so doing, the District Court emphasized that "[t]he 1979 and 1984 distributions, though similar to each other in nature, are, however, different items." (Id.)

This appeal followed. (A. 4.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

Pursuant to Local Rule 21(g) of this Court, counsel for Appellant respectfully informs this Court that there has been no previous appeal to this Court arising out of this case and that they are not aware of any related cases pending before this Court.

STATEMENT OF THE STANDARD OR SCOPE OF REVIEW

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56 of the Federal Rules of Civil Procedure. The grant or denial of a motion for summary judgment is reviewable de novo. Brounstein v. United States, 979 F.2d 952 (3d Cir. 1992).

ARGUMENT

TAXPAYER'S SUIT FOR REFUND IS TIMELY PURSUANT TO THE MITIGATION PROVISIONS OF INTERNAL REVENUE CODE SECTIONS 1311, ET. SEQ.

1. Introduction and Statute of Limitations-General Principles

Taxpayer filed her 1979 federal income tax return timely, and therefore, it is deemed to be filed as of April 15, 1980. Code Section 6513(a). On her 1979 federal income tax return, Taxpayer included in her taxable income certain amounts, totalling $19,803, reported to her as taxable income on the Schedule K-1 issued by the Trust. Taxpayer subsequently filed an amended income tax return for 1979, asserting that the distributions from the Trust totalling $19,803 were improperly included in her income for 1979 and that the additional tax due to the application of the throwback rules was improperly asserted against her ("Claim"). That Claim was denied, and Taxpayer brought this refund action.

As relevant here, Code Section 6511 provides that a taxpayer must file a claim for refund of overpaid tax within three years from the filing of a tax return. If a taxpayer fails to file a claim for refund timely, the taxpayer cannot bring a refund suit in the federal district courts. Code Section 7422(a).

As Taxpayer's 1979 federal income tax return was filed as of April 15, 1980, the general statute of limitations period of Code Section 511

expired as of April 15, 1983. Taxpayer's Claim was not filed until May 13, 1992. Taxpayer asserts that her claim for refund is timely by virtue of the ameliorative mitigation provisions of Code Section 1311, et. seq., which provide relief from the limitations period of Code Section 6511 in certain circumstances.

Specifically, the mitigation provisions provide for the correction of errors that otherwise could not be corrected because of the statute of limitations. Such errors are corrected by allowing a tax year otherwise "closed" by the statute of limitations to be "opened." The mitigation provisions generally apply to avoid inequities from the rigid application of the statute of limitations.

While the party seeking to open a closed year has the burden to establish that the mitigation provisions apply, it has been recognized that this does not mean that "the statute should be so strictly or narrowly interpreted as to defeat its apparent purpose." E.g., United States v. Rosenberger, 235 F.2d 69, 73 (8th Cir. 1956). Indeed, the obvious goal of the income tax laws is to collect income tax from the taxpayer actually owing the tax. As a result of these general principles, there often is a tension between the statutory requirements for application of the mitigation provisions and the equitable objective of the mitigation provisions.

In the words of the United States Court of Appeals for the Fourth Circuit (Chertkof v. Commissioner, 649 F.2d 264, 267 (4th Cir. 1981)):

> It was not congressional intent, in enacting the mitigation provisions, to benefit either

> the Commissioner [of Internal Revenue] or the taxpayer to the exclusion of the other. The basic purpose of the mitigation provisions is to permit the correction of an earlier decision which is determined to be erroneous in a subsequent administrative or judicial action; the intent is that the correct tax be paid or the correct deductions be allowed, not that a windfall be provided to either the taxpayer or the government on a gamesmanship theory of "fault."

This Court also has commented that the basic purpose of the mitigation provisions is to prevent manipulation by either the taxpayer or the Commissioner with respect to the treatment of income or deductions by taking inconsistent positions. Kappel's Estate v. Commissioner, 615 F.2d 91 (3d Cir. 1980).

For the mitigation provisions to apply, (1) there must be a determination, as defined by Code Section 1313(a); (2) the determination must fall within one of six circumstances of adjustment enumerated in Code Section 1312; (3) the correction of the error must be prevented by the operation of law, and (4) an inconsistent position must be maintained by the party against whom the mitigation provisions will apply.

In its Memorandum in Support of its Motion for Summary Judgment, the Government conceded that the third prong of the test for application of the mitigation provisions is met, i.e., the statute of limitations period of Code Section 6511 expired at the time of the Tax Court's determination. The three remaining prongs, according to the Government, were not satisfied.

Without discussing the remaining prongs of the test at issue, the District Court found that Taxpayer did not satisfy the fourth requirement. For the sake of completeness, all of the disputed prongs are discussed below.

In reviewing the application of the mitigation provisions to the instant case, it is important to consider the real issue. It is not particularly significant whether a refund of $14,226 will be issued to Taxpayer for 1979. The crux of this case, which Taxpayer has attempted to bring to the attention of the appropriate officials (see A. 76-112), is that income is going untaxed because the Government is not enforcing the tax laws. For example, after the Tax Court ruled that the income reported on the Schedule K-1 for 1984 was not taxable to Taxpayer, there was no effort on the part of the Government to collect taxes on that income from the recipient of that income, Cecil Lichtman, or to recompute the undistributed taxable income of the Trust for purposes of applying the throwback rules. Presumably, once the Tax Court determined that these amounts were not taxable to Taxpayer, there should have been some effort to collect income tax from the proper taxpayer. Of course, this same problem exists in each of the seven trusts created by Taxpayer's grandfather, as each trust includes identical dispositive provisions, and each trust has been treated similarly. Only with this framework in mind can Taxpayer's argument regarding the mitigation provisions be appreciated.

2. There was a determination within the meaning of the mitigation provisions

As relevant here, for purposes of the mitigation provisions, a determination includes a decision by the United States Tax Court or a closing agreement. See Code Section 1313(a). A closing agreement is an agreement made between the Commissioner and Taxpayer under Code Section 7121 relating to a taxpayer's liability.

Here, the United States Tax Court, in a decision entered April 9, 1992, determined that there was no deficiency in Taxpayer's 1984 federal income tax. The only issue involved in that proceeding was Taxpayer's liability for federal income tax as a result of the 1984 principal distribution from the Trust.

According to the regulations, a determination for purposes of the mitigation provisions must involve the same kind of tax and the same item of tax. Treas. Reg. Sec. 1.1311(a)-2(b). There is no question in the instant case that Taxpayer's individual income tax was at issue in the 1984 Tax Court proceeding, and is at issue in this proceeding. Nor is there any question that the same item was involved in 1984 and 1979. The issue here, like 1984, involves the proper treatment of principal distributions made to Taxpayer by the Trust in accordance with the terms of the Trust and with the Code.

By determining that there was no deficiency in Taxpayer's 1984 federal income tax, the Tax Court necessarily determined that principal distributions by the Trust are not includible in Taxpayer's taxable income. The Commissioner,

however, refused in the Tax Court proceeding to enter into a closing agreement to state the reasons for conceding that the Taxpayer was correct in her position. The Commissioner further refused to read the basis of the settlement into the record. (See A. 158-168.) Nevertheless, the Tax Court decision constitutes a determination as defined by Code Section 1313(a).

In its Memorandum in Support of its Motion for Summary Judgment, the Government sought to recharacterize the nature of the Tax Court proceedings. According to the Government, "[t]he Tax Court decision merely granted the Commissioner's oral motion to dismiss for failure to prosecute, and a decision was entered that there were no determinations or additions to tax due from [Taxpayer]." (A. 121-122.)

To be sure, the Tax Court's determination was based upon a dismissal for failure to prosecute, but Taxpayer failed to prosecute her case only because the Commissioner had conceded that there was no deficiency in Taxpayer's income tax, agreeing with Taxpayer's position. The Government did not seek to explain why the Tax Court would enter a "no deficiency" decision if the Tax Court case truly were dismissed for failure to prosecute. In a true "failure to prosecute" case, a deficiency determination would have been entered by the Tax Court against the Taxpayer, as the Taxpayer bears the burden of proof in the Tax Court. See generally Rule 142 of the Rules of Practice and Procedure of the United States Tax Court. Obviously, the parties agreed that Taxpayer's position was correct and,

therefore, there was no need for Taxpayer to prosecute her case or for the Tax Court to entertain the merits of the case. The Government has not, and indeed cannot, offer any other explanation for the Tax Court's decision.

The real crux of this case is that the Government is seeking to deny Taxpayer the benefit of the mitigation provisions by hiding behind the Commissioner's prior refusal to put the basis of the Tax Court settlement on the record or to enter into a closing agreement. See Beneson et. al. v. United States, 567 F. Supp. 101 (D.C. NY 1966), aff'd without discussion of this point, 385 F.2d 26 (2d Cir. 1967)(taxpayer cannot deny the United States the benefit of mitigation provisions by refusing to execute closing agreement or entering into consent judgment.) The United States is seeking to do just what the taxpayer was not allowed to do in Beneson. Had the Commissioner entered into a closing agreement, as requested by Taxpayer, there clearly would be a "determination" within the meaning of the mitigation provisions. Code Sec. 1313(a)(2).

3. The determination falls within the circumstances of adjustment specified in the mitigation provisions

The Government also asserted in its Memorandum in Support of its Motion for Summary Judgment that the Tax Court's determination does not fall within any of the circumstances of adjustment specified in the mitigation provisions. To the extent that this argument is true, it is because

of the United States' own failure to collect the proper amount of income tax to which it is entitled; it is not due to Taxpayer's actions.

The Tax Court's determination regarding Taxpayer's 1984 income tax liability plainly comes within Code Section 1312(5), which applies to correlative deductions and inclusions for trusts and beneficiaries. The situation here falls squarely within that provision because, as a general rule, income distributions in excess of current income are taxable based upon the accumulated undistributed income from prior years. Here, the Tax Court has determined that the 1984 principal distribution was not taxable to Taxpayer. Similarly, the income, both distributed and undistributed, has not been properly computed for any of the trusts created by Taxpayer's grandfather.

In so doing, the Tax Court concluded that the Trust was not entitled to the claimed income tax distribution deduction on its 1984 fiduciary income tax return. Accordingly, a correlative adjustment within the meaning of Code Section 1312(5) is involved. As the 1979 distribution involves the same set of facts, the same is true for the 1979 distribution to Taxpayer.

As a further result of the Tax Court's determination, the Trustees' attempt in 1979 and 1984 to allocate distributed income to Taxpayer's principal distributions pursuant to the throwback rules must fail. The Trust instead must open its returns for all the years (including 1979) in which it sought to allocate any taxable income to Taxpayer to redetermine its proper undistributed income balance. That being the case, all the

income should be charged to Cecil Lichtman, who received the income distributions. The proper amount to be charged to Cecil Lichtman can only be determined by recomputing the undistributed income balances after properly disregarding all of the principal distributions made to Taxpayer, which distributions improperly were characterized as distributions of taxable income to Taxpayer. Simply put, if the Trust's prior years' income tax returns are not reopened to recompute the undistributed income balances, the income distributions escape taxation.

The real problem arises in this case because neither the United States nor the Trustees have made any attempt to open the Trust's tax returns to account for the income distributed properly. It of course is understandable why the Trustees have not done so, as Cecil Lichtman, one of the Trustees, is the income beneficiary who then would be charged with this income. It is not understandable, however, why the Commissioner has not sought to invoke the mitigation rules to collect the taxes on the Trust income that has been distributed to Cecil Lichtman, and which has gone untaxed as a result of the Tax Court's decision. Indeed, Taxpayer has brought this matter to the Commissioner's attention on many occasions. (A. 76-112.)

In short, Taxpayer should not be denied the benefit of the mitigation provisions simply because the parties in a position to invoke the mitigation provisions rules refuse to do so. The amounts charged as income to Taxpayer for 1979 are not includible in Taxpayer's income, and pursuant to Code Section 1312(5), Cecil Lichtman,

who received the income distributions from the Trust, should be charged with the income from the Trust.[3]

4. The Internal Revenue Service has maintained an inconsistent position

In concluding that Taxpayer cannot meet the fourth requirement for application of the mitigation provisions, the District Court simply stated that "[t]he mitigation provisions only protect against a party taking an inconsistent position on the same item in different tax years,

[3] The determination arguably falls within Code Section 1312(7), which relates to basis determinations. That is because the income distribution deduction allowed in 1979 has an impact upon all subsequent income distributions, as such income distributions is taxable if it does not exceed the Trusts' accumulated income. Code Secs. 661, et. seq. As such, the income previously distributed may have an impact upon the basis of property distributed by the Trust. E.g., Gooding v. United States, 326 F.2d 988 (Ct. Cl.), cert. denied, 379 U.S. 834 (1964) (determination that payments on notes made in 1947 and 1948 were dividends came within mitigation provisions for purposes of a mitigation claim for refund of capital gains tax paid for 1946 because any basis in the notes redeemed was reallocated to the remaining notes and stock).

not on similar items in different tax years. (A. 8-9, citing MacDonald v. Commissioner, 17 T.C. 934, 941 (1951).) The District Court apparently believes that this requirement cannot be met because the Tax Court determination dealt with the 1984 distribution, not the 1979 distribution now at issue.

The District Court's argument cannot be sustained. The entire point of the mitigation provisions is that, even though each tax year stands on its own, when there is a determination involving one tax year that has an impact upon another (closed) tax year, a correction can be made to the closed year under certain circumstances. And in the instant case, there are other taxpayers, including the Trust itself, whose tax liabilities are affected by the character of the amounts distributed because, by reducing the Trust's accumulated income by the 1979 and 1984 principal distributions, the taxable amount of other income distributions is distorted.

To be sure, in some of the circumstances described in the mitigation provisions, such as the double inclusion of a particular item of income, the identical item of income must be involved. This case, however, does not involve double inclusion. Indeed, the case cited by the District Court, MacDonald v. Commissioner, was such a case in that the case involved a deficiency assessment made by the Commissioner. There, the Commissioner sought to make an assessment against a taxpayer that otherwise was time-barred. The Tax Court found that the mitigation provisions did not authorize the

assessment simply because the taxpayer's method of computing the amounts at issue was similar in time-barred years and current years.

Here, both the 1984 distribution and 1979 distribution were made according to the same provision of the Trust. Other than the amounts and the timing, the distributions are in all respects identical, and should be treated the same. It is well-settled that it does not matter which party causes the inconsistent position (Chertkof, supra) or that the inconsistent position is fortuitous or the result of design (S. Rep. No. 1567, 75th Cong., 3d Sess. (1938) p. 49). The District Court misses this crucial point.

At all events, the District Court ignores the true inconsistency at issue in this case. The inconsistent position maintained by the Commissioner is the result of the Commissioner's failure to invoke the mitigation provisions to reopen the Trust's income tax returns to properly account for income distributed. The Commissioner conceded in the Tax Court that the principal distributions made by the Trust to Taxpayer do not result in taxable income to Taxpayer. Accordingly, the Trustee improperly reduced "undistributed income" for purposes of the throwback rules by the amount of the principal distributions. Subsequent income distributions to Cecil Lichtman therefore escaped taxation because the taxable amount of those distributions was computed as if the principal distribution to Taxpayer reduced the undistributed income of the Trust. To date, the Commissioner has not

collected income taxes from Cecil Lichtman with respect to any of these distributions of income.

Yet the Commissioner still allows Taxpayer's 1979 income tax return to remain closed, knowing that the 1979 income tax return included income incorrectly charged to Taxpayer as a result of Trust principal distributions. Even more troubling is the fact that the Commissioner has not sought to open the Trust's income tax returns to properly adjust the undistributed income balance which has been erroneously computed ever year since 1979. Clearly, the Government is maintaining an inconsistent position with Taxpayer at her expense, who does not owe any tax with respect to the Trust distributions. This is an inconsistent position within the meaning of the mitigation provisions.

5. Summary

The mitigation provisions of Code Sections 1311 through 1314 contain a complex and confusing set of rules relating to the correction of errors that otherwise are prevented by the statute of limitations. Because the United States, as a sovereign, must consent to be sued, and the statute of limitations is a term of the United States' consent, the mitigation provisions must be met before the statute of limitations is opened. However, the mitigation provisions cannot be read too strictly, or their purpose will be defeated. See United States v. Rosenberger, supra; First Nat. Bank of Omaha v. United States, 565 F.2d 507 (8th Cir. 1977). Thus, there often is a tension between the

detailed statutory requirements of the mitigation provisions and the equitable objective of the mitigation provisions. The instant case admittedly presents a unique set of facts, complicated by the fact that the Taxpayer was incorrectly charged with income based upon an improper application of the complex throwback rules of Code Section 665, et. seq.

While it may not seem as if the Commissioner is engaged in games-playing or manipulation, upon further reflection, it is apparent that such is the case. In determining that income was not properly chargeable to Taxpayer for 1984, the Tax Court necessarily determined that multiple income tax returns of all the other affected entities, i.e. the Trust, Taxpayer, and Cecil Lichtman, who received income from the Trust, should all be reopened in order to correct the chain of mistakes. Otherwise, the proper tax treatment of the income distributed by the Trust, and the proper treatment of the distributions received by Taxpayer in 1979 and 1984, cannot be determined.

Yet, for whatever reason, neither the Commissioner nor the Trustees of the Trust have reopened the Trust's income tax returns. As a result, the Trust's accumulated income balance was not properly computed, which has an impact upon every distribution from the Trust. Compare Albert W. Priest Trust, 6 T.C. 221 (1947), where the Commissioner reopened a closed year to assess deficiency against an estate for which a distribution deduction was allowed following a determination that the income of the estate was not currently distributable or taxable to the beneficiary. As that case demonstrates, the

Commissioner is not hesitant to apply the mitigation provisions where such provisions benefit the Internal Revenue Service. Because the mitigation provisions are designed to work both ways, the Government should not be allowed here to deny Taxpayer the benefit of those provisions.

The mitigation principles of course are secondary to the equal and fair administration of the tax laws, which requires that the Trust's income tax returns be opened so that the recipient of the Trust's income distributions, Cecil Lichtman, be properly charged with income for the amounts distributed. Indeed, a basic goal of the mitigation provisions is that taxes paid are the correct amounts and that the taxes are paid by the correct taxpayer.

In the unusual situation presented by this case, the mitigation provisions are the only remedy available to Taxpayer to make sure that the fundamental tenet is respected. By closing the doors on Taxpayer, taxable income is going untaxed, or is not included in the proper taxpayer's income. For example, the amounts originally charged to Taxpayer with respect to the 1984 distribution, which amounts have been determined by Tax Court to be nontaxable to Taxpayer, have gone untaxed. Meanwhile, for the other similar trusts created under the Will of Taxpayer's grandfather, it can only be assumed that the taxable income attributable to those Trusts improperly has been charged to the beneficiaries of the principal of the trusts, instead of to the recipients of the income.

By dismissing Taxpayer's suit for refund, the District Court failed to use its equitable powers to correct the aberrations presented by this case. See First Nat. Bank of Omaha, supra (mitigation provisions are intended to supplement equitable powers of courts).

CONCLUSION

For the reasons stated, Taxpayer's claim was timely filed pursuant to Code Section 6511 and the mitigation provisions of Code Sections 1311-1314. The District Court therefore erred in granting the Government's Motion for Summary Judgment on the ground that it lacks jurisdiction over Taxpayer's suit for refund. The District Court's order should be reversed.

Respectfully submitted,

/s/ Howard M. Soloman
Howard M. Soloman, Esquire
Abrahams, Loewenstein, Bushman & Kauffman, P.C.
One Liberty Place, Suite 3100
1650 Market Street
Philadelphia, PA 19103-7392
(215) 561-1030
Attorneys for Appellant
Joan Lichtman

No. 96-1386

Supreme Court U.S.
FILED
APR 9 1997
CLERK

In the

Supreme Court of the United States

October Term, 1996

In the Matter of the
Estate of Doris Lichtman,
deceased

Joan Lichtman, CPA
Petitioner

v.

Cecil Lichtman
Jules Lichtman
Executors
Respondent

Reply Brief

Petition for a Writ of Certiorari

to the
Supreme Court of New Jersey

Joan Lichtman, CPA
Pro Se
Box 1136
Philadelphia, PA 19105
215.568.5908

Dated: April 8, 1997

5 pp

Argument
Respondents' Failure Even to File Notice of Representation Constitutes Their Consent that All Petition Statements - both Fact and Law - are Valid and True

No counsel for the respondents has filed either a response brief or any notification of representation without brief. [Supreme Court Rule 9]. The respondents, themselves, did not file a response brief or a notice of their being *pro se* before this Court. Similarly, not the prior Guardian-ad-Litem, nor any substitute counsel, filed any notice as to representation for the minors.

The 30-day period for respondents to file a brief in opposition and/or to make notification as to counsel has expired.

Supreme Court Rule 15(6) states, in pertinent part,

> "Any petitioner may file a reply brief addressed to new points raised in the brief in opposition, ...".

That the respondents did not file a notice of their being *pro se*, even if declining to file a brief in opposition,

raises a "new point", necessitating this brief reply.

Supreme Court Rule 15(2) states, in pertinent part,

> "...In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." [Emphasis added.]

Clearly, not the respondents, themselves, nor any counsel, representing either the respondents or the minors, sees any legal reason in this case for this Court to deny certiorari.

Had the respondents or their counsel any complaint regarding "any perceived misstatement of fact or law in the petition", they are required to have placed their objection in a brief in

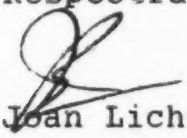
opposition. From the fact of no such brief's being filed, one must conclude that neither the respondents nor their counsel regard ANY statement in the petition, whether it be one of fact or law, as incorrect.

Among the factual statements in the petition, to which no objection has been made, are claims that the respondents and/or attorneys have committed various breaches of fiduciary duties, fraud, tax evasion, perjury, subornation of perjury, tampering with evidence, aiding and abetting tax evasion, as well as the attorneys' willful failure to obey Article VI, clauses 2 and 3 of the United States Constitution. By their individual and collective silence, the respondents and the attorneys for this case, thereby consent that all such statements are, in fact and in deed, the truth.

The respondents have not notified this Court of their being *pro se*, showing they do not intend to file a response brief, should this Court grant certioriari, and, thereby, these respondents may have waived their right to defend their acts.

Those attorneys and respondents' abandonment of their obligations and rights, confirms their elected absence from these proceedings, thus constituting their blessing that the United States Supreme Court grant certiorari to rectify and remedy all the unlawful acts.

Respectfully submitted,



Joan Lichtman
Certified Public Accountant
Petitioner

THIS PAGE LEFT BLANK